

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

COLUMBIA RIVER PACKERS' ASSOCIA-
TION, a Corporation,

Appellant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Appellees.

VOLUME I.
(Pages 1 to 352, Inclusive.)

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

JUL 1 - 1914

F. D. Monckton,
Clerk.

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

G. C. FULTON, Esquire, Astoria, Oregon,
Solicitor for Appellant.

JOHN C. WELSH, Esquire, South Bend, Washington;

MARTIN WELSH, Esquire, South Bend, Washington;

CHARLES W. DORR, Esquire, Colman Building,
Seattle, Washington; and

HIRAM E. HADLEY, Esquire, Colman Building,
Seattle, Washington,
Solicitors for Appellees. [1*]

*In the District Court of the United States, for the
Western District of Washington, Southern Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and I. N. STENSLAND,

Defendants.

Praeceptum for Record on Appeal.

To the Clerk of the Above-entitled Court:

You are hereby directed to take a transcript of record in the above-entitled cause to be filed in the

*Page-number appearing at foot of page of original certified Record.

United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers, to wit:

- (1) Amended complaint.
- (2) Bond for injunction.
- (3) Restraining order.
- (4) Answer and cross-complaint of defendant H. S. McGowan.
- (5) Demurrer of plaintiff to cross-complaint of defendant H. S. McGowan.
- (6) Order overruling demurrer of plaintiff to cross-complaint of defendant H. S. McGowan.
- (7) Answer of plaintiff to cross-complaint of defendant H. S. McGowan.
- (8) Replication of defendant H. S. McGowan to plaintiff's answer.
- (9) Stipulation between counsel as to the demurrer to answer and cross-bill of defendants Lindstrom and Coyle and pleadings of such defendants.
- (10) Petition of plaintiff to dismiss this action.
- (11) Opinion of Court on such motion to dismiss action.
- (12) Order denying petition of plaintiff to dismiss.
- (13) Order allowing plaintiff to file supplemental bill of complaint.
- (14) Supplemental bill of complaint of plaintiff.
- (15) Answer of defendants H. S. McGowan to plaintiff's supplemental bill of complaint.

- (19) Order appointing C. D. Savery, Special Examiner.
- (20) Memorandum of decision of Judge Donworth, of date January 6, 1912.
- (21) Decision of Judge Donworth of date January 24, 1912.
- (22) Interlocutory decree of date February 5, 1912.
- (23) Order appointing M. A. Langhorne, Special Master.
- (24) Report and findings of special master.
- (25) Plaintiff's exceptions to report and findings of special master.
- (26) Motion of defendants for confirmation of report of special master.
- (27) Decision of Judge Cushman, of date August 12, 1913.
- (28) Final decree.
- (29) Transcript and evidence.
- (30) Petition and order for appeal and order fixing the amount of appeal bond.
- (31) Assignments of error.
- (32) Bond on appeal and approval thereof.
- (33) Citation on appeal and proof of service thereof.
- (34) Order certifying original exhibits.
- (35) Order extending time in which to prepare, file and serve transcript on appeal.

G. C. FULTON,
Attorney for Plaintiff.

Due service of the within praecipe is hereby accepted this 3d day of Dec., 1913.

WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

*In the Circuit of the United States for the Western
District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

Amended Complaint.

The above-named plaintiff complaining of the above-named defendants, by this its amended complaint filed herein by leave of the Court first had and obtained, for its cause of action against said defendants alleges,

I.

That plaintiff is now and during all of the days and dates herein mentioned was a corporation duly organized and existing under and pursuant to the laws of the State of Oregon, and duly licensed as such in ac-

cordance with the laws of the State of Oregon, and was and is a citizen of the State of Oregon. That the office and place of business of this plaintiff is now and at all times has been at the City of Astoria in the County of Clatsop in the State of Oregon.

That this plaintiff is and was at all times herein mentioned duly authorized and empowered by its articles of incorporation to own, possess, and acquire real estate and personal property; and to engage in the business of taking and catching and dealing generally in salmon and other fish for trade and profit; and in the operation of all kinds of fishing appliances in the Columbia River and the waters thereof and [4] elsewhere; and to lease and sell real estate and interest in real estate; and to engage generally in the business of taking, catching, handling, packing, and preserving salmon and other fish and the marketing thereof for profit; and is and has been for many years past engaged in such business at Astoria, in Clatsop County in said State of Oregon.

II.

That long prior to the institution of this action and of the grievances herein complained of, to wit, on the 9th day of July, 1906, this plaintiff caused to be filed and recorded in the office of the Secretary of State of the State of Washington a certified copy of its articles of incorporation duly certified to by the Secretary of State of Oregon, who was and is the custodian of the same according to the laws of the said State of Oregon, and who was and is authorized to issue certificates thereof, according to the laws of the State of Oregon, and the same was duly attested by the Secre-

tary of State of the State of Oregon under his hand and seal of the State of Oregon.

And on the same date the plaintiff filed in the said office of the Secretary of State of the State of Oregon a writing signed by the vice-president of plaintiff, one of the chief officers of plaintiff, and attested by the plaintiff's corporate seal, wherein and whereby this plaintiff therein constituted and appointed R. A. Hawkins of Ilwaco, Pacific County, in said State of Washington, its agent to accept service of process in any action or suit pertaining to the property, business, or transactions of this plaintiff within the State of Washington, or in which plaintiff should be a party; which said writing contained the name of said agent, namely, R. A. Hawkins, together with his place of residence, to wit, Ilwaco, Pacific County, State of Washington, [5] together with the office and place of business of plaintiff where the business of plaintiff should be carried on in said State of Washington, to wit, Ilwaco, Pacific County, State of Washington; and in all respects duly and fully complied with all of the laws of the State of Washington relating to and governing foreign corporations transacting business in said State; and was thereupon duly authorized to transact any and all business in said State; and according to the laws of the State of Washington was authorized and permitted to generally do and perform every act and transact every kind of business within said State of Washington in the same manner and to the same extent as corporations incorporated and organized under the laws of said State of Washington are authorized to do by the laws of such State.

This plaintiff further alleges that a majority of its stock is owned by citizens of the United States.

III.

That the defendants are and each is and during all of the times herein mentioned were actual citizens and residents of the State of Washington and each of said defendants resides and did reside during all of the times herein mentioned in the County of Pacific in said State of Washington, and within the jurisdiction of this Court, and within the Western District of Washington, and within the Western Division thereof.

IV.

That long prior to the institution of this suit and the grievances herein complained of, the United States of America was and still is the owner in fee of that certain tract of land situated and located within the County of Pacific in the State of Washington, the same being an island in the Columbia River near the mouth of said river, which was and is generally known [6] and named upon all official records, maps, and plats as Sand Island; together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; which said island has been in existence for many years and is universally known and described as Sand Island.

That said Sand Island was, by proclamation of the President of the United States, duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservation and the same has ever since been held

and reserved as such by the United States.

That, pursuant to an act of Congress, approved July 23, 1892 (27 Stat. 321), granting authority to the Secretary of War, in his discretion, to lease for a period of not to exceed five years such property of the United States under his control as should not for the time be required for public use, the Secretary of War of the United States on the first day of May, 1908, said Sand Island then being under the control of said Secretary of War and then not required for public use, by writing duly executed and approved in the manner provided by law, duly leased to the plaintiff for a good and valuable consideration the following portion of Sand Island, same being designated on the maps and plats of the Government survey as Sites No. 2 and 3, for the term of three years from said date, together with the tide lands, water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia River; which said portion of said island so leased aforesaid and being Sites No. 2 and 3, was and is all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north of a line drawn on the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark [7] due west of the United States Monument No. 4 erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to the east boundary line of Site No. 4 on said Sand Island, said point being a

point on said low-water line that would intersect a north and south line 781 feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked.

That upon the execution and delivery of said issue aforesaid this plaintiff immediately entered into the possession of said premises and of the whole thereof.

That said Sand Island and the premises described in said lease, namely the said Sites No. 2 and 3 above the line of low-water mark consists of a sandy beach up to the line of high water and then it is composed entirely of sand, practically no vegetable grows thereon and the same is not susceptible to cultivation or agricultural uses and contains no minerals or phosphates of any kind. That the bed of said river below said low-water mark is quite level with a hard sandy bottom with quite a gradual slope for a short distance into deep waters. That said Sites 2 and 3 aforesaid are on the south side of said Sand Island and are on the north shore of the main ships' channel of the Columbia River and within the jurisdiction of this Court and within the Western District and Western Division thereof, and that the main channel of the Columbia River washes said shore of said island where said waters are navigated by all the ocean-going vessels, and all the vessels that carry the commerce of Washington and Oregon navigate such waters.

That said premises are and at all times have been of great value for the right of fishery thereon and the right to [8] haul and land seines thereon and in

front thereof, and to operate seines from the shore into the waters thereof and to haul same on the shore thereof for the purpose of catching salmon fish during the salmon fishing season of each year on said river.

That said premises were leased to this plaintiff by the said United States through the Secretary of War for the sole purpose of being used and employed as a fishery and for the sole purpose of operating seines for catching salmon fish from the shore in the waters of said river and landing the same on the shores.

This plaintiff further alleges that, under the laws of the United States, the said waters are required to be kept free from obstructions and that by virtue of said laws and said lease aforesaid plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed; and is entitled of right to the free, unobstructed ingress to and egress from said premises; and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores.

Plaintiff further alleges that heretofore and on the 30th day of June, 1908, pursuant to the laws of the State of Washington, this plaintiff duly applied to the Fish Commissioner of the State of Washington for a license to operate three seines upon said Sites 2 and 3 aforesaid, and then and there paid the said Fish Commissioner the license fee exacted by the said Fish Commissioner and the laws of the State of Washington, to wit, the sum of \$15.00 for license N. 2391 and \$15.00 for license No. 2392 and \$15.00 for

license No. 2393. Thereupon said Fish Commissioner [9] duly issued to plaintiff three licenses to operate seines in the Columbia River, numbered respectively 2391, 2392 and 2393; and thereupon this plaintiff was entitled of right to operate three seines in the waters of the Columbia River within the State of Washington from said date and for the period of one year thereafter.

That, on the second day of July, 1908, whilst said lease was in full force and effect, this plaintiff entered upon the said leased lands aforesaid, namely said Sites 2 and 3 on said Sand Island, together with its three seines and seining outfit, having made preparation to engage in the business of employing said leased premises in the operation of said seines for the purpose of taking and catching salmon fish.

That in order to operate seines in front of said Sites 2 and 3 it is necessary that the waters and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of two or three hundred fathoms, each seine being about that long, and to permit the same to drift with the tide and current and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and under the same lease aforesaid, when the defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in

the channel of said navigable waters of said Columbia River directly in front of plaintiff's leased premises and in front of said Sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters consisting [10] of large stones to which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were seven in number and were placed in the waters of said river about fifty to one hundred feet from the shore and about two or three hundred feet apart. That said stones and anchors, or weights, were large and of great weight and were so placed that plaintiff could not operate its seines in the waters of said river and could not land its seines or either thereof on the shores of said leased premises and absolutely prevented plaintiff from operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river.

That plaintiff thereafter and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof when the said defendants, again on the 4th day of July, 1908, wrongfully and unlawfully and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed, that is to say, that each of said obstructions consisted of a large stone or stones of great weight

to which were attached wire cables and chains, and the same were placed on the bed of the river and the float or buoy of large timbers were attached at the end of said cables; and that said obstructions were placed from fifty to one hundred feet from the shore of said Sites 2 and 3 and from two to three hundred feet apart and in such a position as to absolutely prevent plaintiff from operating its said seines and to prevent plaintiff from landing its seines or any seine on said shore. [11]

That said obstructions are in the navigable waters of said river and are so placed as to prevent the free ingress to and egress out from said premises and interferes with and prevents free access to said premises.

That the defendants threaten to and will, unless restrained by this Court, continue to place other of said obstructions in said waters in front of said premises; and threaten to continue to use and employ the same and will do so unless restrained by this Court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any particular use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith and are and each is an obstruction to the navigation of said river.

This plaintiff further alleges that it has expended for the purchase of seines and appliances necessary to conduct seining operations on said premises and

shores fully \$15,000.00, and has employed and now has in its employ and had in its employ at the institution of this action thirty-four men, and was and is keeping and caring for twenty-four horses, all necessary to be employed and used in operating *and* seining grounds; and plaintiff was and is required to expend each day to maintain said outfit at least \$200.00. That plaintiff is required to pay as rental for said premises the sum of \$5,175.00 per annum. That the salmon fish on the Columbia River are of great value and ascend the river only at certain intervals during each year, and are now in the waters of said river in great numbers, and if the defendants are permitted to maintain said obstructions, plaintiff will not [12] be able to use said grounds or employ its seines and will be irreparably damaged; that the damages will amount to many thousands of dollars, but it is absolutely impossible to measure such damages by money, for it is impossible to ascertain how many fish plaintiff would catch.

That the said trespass herein complained is continuous and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises and will continue to harass and annoy plaintiff and prevent from ingress to and egress from said premises.

That an emergency exists and plaintiff is entitled to a preliminary injunction enjoining each of said defendants from maintaining said obstructions and from placing any obstructions in front of said prem-

ises or in the waters adjacent thereto, or from interfering with plaintiff's ingress to and egress from said premises and from interfering with the operation of seines on the shores of said sands and from interfering with the landing of said seines.

That the obstructions herein complained of were placed in said waters without any authority from the Secretary of War, or any officer of the Government of the United States, and were placed in said waters in violation of the laws of the United States, and of the State of Washington, and were placed therein as aforesaid for the sole purpose of harassing and annoying plaintiff and preventing plaintiff from ingress to and egress from said premises aforesaid.

WHEREFORE by reason of the premises plaintiff demands judgment and decree, [13]

First: That this Court decree that an emergency exists in this case and that a preliminary injunction be issued herein enjoining and restraining said defendants and each of them, their servants, agents, and employees and all persons acting by, through, or under them from placing in any of the waters of the Columbia River in front of or adjacent to said Sites No. 2 and 3 on said Sand Island, or from maintaining in front of said premises in said waters any obstruction whatever, particularly the obstructions now there *maintain* as hereinbefore mentioned, and from any interference with the free and uninterrupted ingress to and egress from said premises.

Second: That upon the final hearing herein the injunction be made perpetual, and that all obstructions placed in said waters in front of said premises

be abated and the defendants be required to remove the same, and upon their failure to do so that plaintiff be entitled to do so at the cost and expense of said defendants.

Third: That plaintiff have such other and further judgment and decree in the premises as to this Honorable Court may seem equitable and just.

G. C. FULTON,
Attorney for Plaintiff.

State of Oregon,
County of Clatsop,—ss.

I, Samuel Elmore, being first duly sworn, depose and say that I am vice-president and general manager of plaintiff in the above-entitled action; and that the foregoing Amended Complaint is true, as I verily believe.

SAMUEL ELMORE. [14]

Subscribed and sworn to before me this first day of August, 1908.

[Notarial Seal] G. C. FULTON,
Notary Public for Oregon.

My commission expires Dec. 28, 1909.

State of Washington,
County of Pacific,—ss.

Due service of the within Amended Complaint is hereby accepted in said county and State, this 5th day of August, 1908, together with a copy thereof.

WELSH, WELSH & O'PHELAN,
Attorneys for Defendants.

[Endorsed]: Amended Complaint. Filed U. S. District Court, Western District of Washington.

Aug. 11, 1908. A. Reeves Ayres, Clerk. ———, Deputy. [15]

*In the Circuit Court of the United States for the
Western District of Washington, Western Di-
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and L. N.
STENSLAND,

Defendants.

Bond for \$2,000.00 for Injunction.

The above-named plaintiff having instituted a suit in the above-entitled court asking for a preliminary injunction enjoining and restraining the above-named defendants from the doing of certain acts and things in the complaint mentioned, and the said Court being advised that an emergency exists and has granted said restraining order and has fixed the bonds therefor at the sum of \$2,000.00;

NOW, THEREFORE, we, Columbia River Packers' Association, as principal, and The United States Fidelity & Guaranty Company as surety, hereby undertake that the above-named plaintiff will pay all damages and costs which may accrue by reason of the injunction or restraining order, not exceeding, however, said sum of \$2,000.00.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7th day of July, 1908.

COLUMBIA RIVER PACKERS' ASSOCIATION,

By SAMUEL ELMORE,
Vice-president.

THE UNITED STATES FIDELITY AND GUARANTY CO.,

[Seal of Surety Co.] By DOUGLAS R. TATE,
Its Attorney in Fact.

[Endorsed]: Filed & Approved July 7, 1908. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Deputy.
[16]

*In the Circuit Court of the United States for the
Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION (a Corporation),

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

Bond for \$10,000.00 for Injunction.

WHEREAS the above-named plaintiff has instituted an action in the above-entitled court against the above-named defendants praying, among other things, for an injunction and restraining order *pen-*

dente lite; and said injunction having been heretofore issued upon an order requiring the said defendants to appear before the above-entitled court at the court-rooms thereof at Seattle, King County, Washington, on Monday, July 20, 1908, at 10 o'clock A. M. and show cause why such preliminary injunction should not continue in force. And said parties having appeared before said court at said time and such proceedings were then and there had that the said hearing was continued until the first Monday in September, to wit, Monday, September 7, 1908, at the court-rooms of the above-entitled court; and said preliminary injunction was by order of the Court continued in force until said date and until the further order of the Court, and the plaintiff was required to give another bond in the sum of \$10,000.00 for a continuation of such injunction;

NOW THEREFORE we, Columbia River Packers' Association, a corporation, plaintiff, and United States Fidelity and Guaranty Company, as surety, hereby undertake that the above-named plaintiff [17] will pay all damages and costs which may accrue to the defendants by reason of said injunction or restraining order, not exceeding however the sum of \$10,000.00.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 21st day of July, 1908.

[Seal of Columbia River Packers' Assn.]

COLUMBIA RIVER PACKERS' ASSO-
CIATION,

By S. ELMORE, [Seal]

Vice-president.

[Seal of Surety Company]

THE UNITED STATES FIDELITY AND
GUARANTY CO.,

DOUGLAS R. TATE, [Seal]

Attorney in Fact.

[Endorsed]: Filed July 24th, 1908. A. Reeves
Ayres, Clerk. [18]

*In the Circuit Court of the United States for the
Western District of Washington, Western Di-
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and L. N.
STENSLAND,

Defendants.

Restraining Order.

Now on this day came on to be heard the above-entitled cause before the above-entitled court on the application of the plaintiff for a preliminary injunction. And the Court, on reading the bill of complaint filed by the complainant herein, and on motion of G. C. Fulton, Esq., its solicitor.

IT IS ORDERED BY THE COURT that this cause be and the same is hereby set for hearing before this Court at Seattle, King County, Washington, on the 20th day of July, A. D. 1908, at ten o'clock A. M. at the courtroom in the above-entitled court;

and the said defendants are hereby required to then and there appear to show cause, if any, why an injunction should not be issued enjoining and restraining said defendants from the doing of the acts and things complained of in complainant's complaint;

On the application of said complainant for an injunction *pendente lite*, it appearing to the Court that an emergency exists, and that the complainant is entitled to such injunction, and the said complainant having filed herein its bond with sufficient surety approved by the clerk, in the sum of Two Thousand Dollars (\$2,000);

IT IS FURTHER ORDERED BY THE COURT that the said defendants and each of them, and all persons acting by, through or under them, their servants, agents and employees, are hereby [19] enjoined and restrained until the further order of the Court in the premises, from in any manner interfering with the free ingress to and egress from, and from placing or maintaining any obstruction or anchor or killock, or any timber, log or appliance whatever, that will interfere with the use of a seine floating upon and navigating the waters of the Columbia River in front of or adjacent to Sites Numbered Two (2) and Three (3) on Sand Island in the County of Pacific in the State of Washington, the shore line of said Sites numbered (2) and Three (3) being described as follows:

Beginning at a point 4000 feet easterly along low-water line from a point on low-water line due west of United States Monument No. 4 erected on Sand Island by the United States Government Survey;

thence easterly along the said shore line to east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that will intersect a north and south line 781 feet east of United States Monument No. 6 on said Sand Island. That Sand Island referred to herein is the island that is generally known and recognized on all official records, maps and plats as *San* Island, and is an island located on the Columbia River opposite the town of Ilwaco between the County of Pacific in the State of Washington and the County of Clatsop, in the State of Oregon, and on the north shore of the main channel of the Columbia River.

Dated July 7th, 1908.

C. H. HANFORD,
Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed restraining order on the therein named H. S. McGowan, J. P. Coyle, and Erick Lindstrom at McGowan, Wash.; and Walter Bussey and L. N. Stensland, whose true name is I. N. Stensland, at Chinook, Washington, by handing to and leaving a true and correct copy thereof with H. S. McGowan, Erick Lindstrom & J. P. Coyle at McGowan, [20] Wn.; and Walter Bussey and I. N. Stensland personally at

Chinook, Washington, in said District on the eighth day of July, A. D. 1908.

C. B. HOPKINS,
U. S. Marshal.
By J. F. Statter,
Deputy.

Dated at Tacoma, Washington, on this 9th day of July, A. D. 1908.

Marshal's fees, \$10.00.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Jul. 7, 1908. A. Reeves Ayres, Clerk. ———, Deputy. [21]

*In the Circuit Court of the United States for the
Western District of Washington, Western Di-
vision.*

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and L. N.
STENSLAND,

Defendants.

Answer of Defendant, H. S. McGowan, in Equity.

The defendant, H. S. McGowan, now and at all times hereinafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections, in the plaintiff's said

amended bill of complaint, in the above-entitled action contained, for answer thereto says, admits, alleges and denies as follows:

1.

This defendant admits that plaintiff is now and was at all the times mentioned in its amended complaint, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it was and is a citizen of said State and that its office and place of business is in Astoria in said State; and this defendant admits that plaintiff is now and was at all of the times mentioned in plaintiff's amended complaint authorized and empowered by its articles of incorporation, to own, possess and *acquit*, real estate and personal property.

This defendant denies that plaintiff is now and was at all of the times in its amended complaint mentioned or that it is now or that it ever was authorized and empowered or authorized or empowered by its articles of incorporation or otherwise to [22] engage in the business of taking and catching or of taking or catching and dealing generally or otherwise in salmon and other fish or in salmon or in other fish, for trade and profit or for trade or profit. This defendant denies that plaintiff is or was at any time whatever or at all authorized and empowered by its articles of incorporation or that it ever was authorized or empowered by its articles of incorporation to engage in the business of operating of all kinds of fishing appliances or of any kind of fishing appliances in the Columbia River and the waters

thereof or in the Columbia River or the waters thereof.

2.

This defendant admits that on or about the 9th of July, 1906, plaintiff caused to be filed and recorded in the office of the Secretary of State of the State of Washington, a certified copy of its articles of incorporation, duly certified to by the Secretary of State of the State of Oregon; and that plaintiff also filed in said office of the Secretary of State of the State of Washington, a writing signed by the vice-president of plaintiff, and attested by the plaintiff corporation seal, wherein and whereby said plaintiff therein constituted and appointed R. A. Hawkins, of Pacific County, Washington, its agent to accept service of process in any action or suit brought by or against plaintiff, within the State of Washington, or in which plaintiff should be a party in said State; and that said writing contained the name of said agent, namely, R. A. Hawkins, together with his place of residence, as Ilwaco, Pacific County, State of Washington; but this defendant denies that plaintiff was or is authorized, at any time whatever or at all, by the laws of the State of Washington or otherwise, to perform every act and transact or to perform any act or transact any kind of business within the *State* [23] *Washington*, in the same manner and in the same extent or in the same manner or to the same extent as corporations incorporated and organized under the laws of said State of Washington, are authorized to do by the laws of said State.

That as to whether a majority of the capital stock

of plaintiff is owned by citizens of the United States, this defendant has not sufficient knowledge or information on which to base a belief and therefore denies the same.

3.

Defendant admits paragraph number three of plaintiff's amended complaint.

4.

This defendant denies that prior to the institution of the above-entitled action or at any other time whatever or at all, that the United States of America was and is or that the United States of America was or is the owner in fee or otherwise or at all of that certain tract of land, situated within the County of Pacific, and the State of Washington, the same being an island in the Columbia River, in said Pacific County, Washington, and which is generally named and known as Sand Island; and this defendant denies that the United States of America at any time or at all ever owned Sand Island or any part thereof whatever or at all; and this defendant denies that at the time of this action or at any other time whatever or at all, that the United States of America owned, or that the United States of America is the owner of said Sand Island or any part thereof, or of all or of any of the tide lands or all or any of the water rights or all or any of the privileges or any easements, surrounding or adjacent thereto, and surrounding and adjacent thereto and bordering thereon. [24]

This defendant denies that the United States of America was at the time of the commencement of

the above-entitled action or at any other time whatever or at all, or that it is the owner of any tide land water rights or privileges, or easement surrounding or adjacent to Sand Island defendant alleges is an island in the Columbia River situated in Pacific County, Washington.

This defendant admits that Sand Island is an island in the Columbia River, in Pacific County, Washington, and is known as and described as Sand Island.

This defendant denies that said Sand Island was, by proclamation by the President of the United States, duly issued and published on the 29th of August, 1863, or at any other time whatever or at all reserved from sale, for military purposes or for any other purpose or for military reservations, or for any other reservation; and denies that the same has ever since the 29th of August, 1863, been held and reserved for military and for military purposes, and for military reservations; and denies that the same has ever been held and reserved by the United States at any time whatever or at all, for military purposes and for military reservations or for military purposes or for military reservations or for any other purposes whatever or at all.

This defendant denies that the Secretary of War, from the first day of May, 1908, or at any other time whatever or at all, leased to the plaintiff any tide lands, water rights, fishing rights, in the Columbia River, or in the Columbia River; that defendant denies that pursuant to an act of Congress, approved July 23, 1892, granting authority to the Secretary

of War in his discretion to lease for a period of not to exceed [25] five years, such property in the United States under his control, as should not be required for public use; and denies that the Secretary of War of the United States on the first day of May, 1908, or at any other time leased to the plaintiff, any tide lands, water rights, fishing rights, or any riparian rights adjacent to Sand Island or to the navigable channel of the said Columbia River. Defendant denies that the Secretary of War of the United States, on the first day of May, 1908, or at any other time, leased to plaintiff, for a valuable consideration, or at all the following portions of Sand Island, to wit: Sites numbered Two and Three, for the term of three years or for any other time, together with the tide lands or any lands, or water rights, or fishing rights, or riparian rights adjacent to said Sand Island; and denies that the Secretary of War at any time whatever or at all leased to plaintiff tide lands or water rights, or fishing rights, or riparian rights adjacent to Sand Island or any part thereof.

And this defendant denies that the Secretary of War, on the first day of May, 1908, or at any other time whatever or at all leased all or any of the frontage or tide lands or any of the riparian rights or any water rights or any privilege whatever or at all of said Sand Island to plaintiff.

Defendant denies that the Secretary of War of the United States leased to the plaintiff on May first, 1908, or at any other time, or at all, any portion of said Sand Island, comprising any frontage or any tide lands, or any riparian rights, or any water

rights, south from high lands, north of the line drawn on the line of low-water mark on the Columbia River, on the south side of said island, beginning at a point 4000 feet east along low-water mark due west of the United States Monument Number [26] Four on Sand Island, and thence east along the said shore line to the east boundary line from Monument Number 4 on said Sand Island. Said point being a point on said low-water line that would intersect the north and south line 781 feet distant, east of the United States Monument Number Six, erected on Sand Island, by the United States Government surveyor; and denies that the Secretary of War ever leased to plaintiff at any time whatever or at all, any frontage, tide lands, or tide lands, or riparian rights, or *or* any water rights or any privileges whatever on said Sand Island or that the Secretary of War leased any of the frontage or any of the tide lands or any riparian rights or any water rights, fronting or abutting or adjacent to or in the waters surrounding said Sand Island.

Defendant further denies that the plaintiff ever leased from the United States Government, or from the Secretary of War of the United States, any tide lands or riparian rights or any rights or privileges whatever in the waters of the Columbia River in or surrounding said Sand Island, excepting that defendant admits that Sand Island is an island situated within the said Columbia River, in Pacific County, Washington; and that the Secretary of War of the United States did, on or about the first day of May, 1908, purport to lease to plaintiff Site Number 2 and

Site Number 3; and that said Site Number 2 and the boundaries thereof are described as follows: The west boundary corresponds with the east boundary of Site Number One, and the east boundary is marked by a line due south from the United States Monument Number 5, to low water; and that the boundaries of Site Number One are as follows, to wit: The north boundary is marked by a line drawn due west from the United States Monument Number Four, to the intersection of the low-water line, the east [27] boundary is marked by a line due south from the point 1314.5, due west of the United States Monument Number Four, to the intersection with low-water line; and that Site Number Three is described as follows, to wit: The west boundary corresponds with the east boundary of Site Number Two, and the east boundary is marked by a line due south to low water, from a point 781 feet due east of the United States Monument Number Six.

And this is the pretended lease which plaintiff alleges in its amended complaint; and this defendant denies that the Secretary of War of the United States ever at any time whatever or at all ever leased or pretended to lease to plaintiff any fishing rights in the waters surrounding said Sand Island in the Pacific County, State of Washington.

This defendant further answering says and avers: That neither the Secretary of War of the United States nor the United States has any power and never did have any power or authority whatever to lease to plaintiff or to any other person any riparian or fishing rights, nor the right to fish for salmon

fish in the waters of the Columbia River within Pacific County, Washington; and that the Sand Island which is mentioned and described in plaintiff's amended complaint is not the Sand Island which the President of the United States by proclamation duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservations or for military reservations; and this defendant is informed and believes and on his best information and belief alleges and says: That the Sand Island which the President of the United States, by proclamation, duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes, and for military reservations, did long prior to the commencement of [28] this action, and prior to January first, 1908, became submerged with the water of the Columbia River and it ceased to exist prior to January the first, 1908, and at no time since has existed.

Defendant denies that upon the execution and delivery of said purported lease or of any lease, that plaintiff immediately entered into the possession of said premises, or of any part thereof, or that plaintiff immediately after the first of May, 1908, entered into the possession of said premises or any part thereof, excepting that defendant admits that on the 2d and 3d day of July, 1908, and since said time plaintiff did go upon said Sand Island and did unlawfully trespass upon and unlawfully fish for salmon fish on the locations of this defendant set nets hereinafter described.

Defendant denies that said Sites Number Two

and Three as aforesaid, and mentioned in plaintiff's amended complaint, are on the south side of said Sand Island, or that either of them is on the south side of said Sand Island; and denies that said Sites Number Two and Three or any or either of them are on the north shore of said main ship channel, but defendant admits that said sites are on the said Sand Island and that said Sand Island is on the north shore of said main ships' channel on the Columbia River.

Defendant admits that said Sand Island and said sites are within the jurisdiction of this Court and are within the Western District and Western Division thereof; and that the water of the Columbia River washes said shore of said Sand Island; and defendant denies that said waters which are in close proximity to said Sand Island, are navigated by the ocean-going or any of the ocean-going vessels or any vessel whatever or at all; and defendant denies that all the vessels that carry or [29] that any vessel that carries the commerce of said States of Washington and Oregon, or either of said States, navigate said waters, excepting that said defendant does admit that the Columbia River is a navigable stream; and that vessels which carry the commerce of Washington and Oregon navigate in the main ships' channel of said Columbia River; and defendant admits that said Sand Island, which is now situated within the Columbia River, and within Pacific County, Washington, is surrounded on the south side of Sand Island by the waters of the Columbia River; defendant denies that said Sites Number Two and

Three or any of them, extend beyond the line of low water in said Columbia River.

Defendant denies that Sand Island or said Sites Number Two and Three or either of them have any riparian rights or that the lessors or any person claiming title thereto have any riparian rights beyond the line of ordinary high tide in the waters of the said river.

That as to whether or not said Sand Island contains any mineral or phosphate, of any kind, this defendant does not have any knowledge or information, sufficient to form a belief and therefore denies that said Sand Island does not contain any mineral or phosphate.

Defendant denies that said premises of said Sand Island or said Sites Number Two and Three or any or either of them are or at any time have been of great value or of any value whatever or at all for the right of fisheries thereon.

This defendant denies that said premises or any or either of them, that is, said Sand Island or said Sites Number Two and Three or either of them were leased to plaintiff by the said United States or the Secretary of War for the sole purpose [30] of being used and employed as a fishery or for the purpose of being used as a fishery or for the sole purpose of operating seines or any seines for catching salmon fish from the shore, and the waters of said river, and landing the same on the shore; and this defendant denies that said Secretary of War of the United States or the United States, or any or either of them, had any right to lease to plaintiff or to any

other person the waters of said river or any part thereof for the purpose of catching salmon fish or for the purpose of operating seines for the purpose of catching salmon fish in the waters of said river; and denies that the Secretary of War had any right or authority to lease to plaintiff said Sand Island or any part thereof for the purpose of fishing in the waters of said Columbia River; and denies that United States or the Secretary of War thereof leased to plaintiff said Sites Number Two and Three for the purpose of authorizing plaintiff to fish in the waters of said Columbia River.

And this defendant says and avers that the Secretary of War of the United States has no authority and is not and was not authorized to lease to plaintiff the right to fish in the waters of the Columbia River, within Pacific County, Washington; and had no authority to lease to plaintiff or to give to plaintiff the right to fish for salmon fish in the waters of the Columbia River, within Pacific County, Washington.

This defendant denies that under the laws of the United States or otherwise, the said waters are required to be kept free from obstruction; and denies that by virtue of said laws, and said lease, as aforesaid, or either of them, plaintiff is entitled of right to have said waters on said channel of said river free and unobstructed; or that plaintiff is entitled [31] to have said waters free and unobstructed; and denies that plaintiff is entitled of right or at all to the free and unobstructed ingress to and egress

from said premises; and denies that plaintiff has any right of ingress to and egress from said premises; and denies that plaintiff is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish in the waters of said river and landing the same on said shore; and defendant denies that plaintiff is entitled to the exclusive right of catching salmon fish in the waters of said river in front of Sites Number Two and Three or in front of any or either of them; and denies that plaintiff has any right whatever of catching salmon fish in the waters of said Columbia River beyond low tide, and in front of said Sites Number Two and Three.

Defendant denies that plaintiff on the 30th of June, 1908, or at any other time applied to the Fish Commissioner of the State of Washington for a license to operate three seines or any seine upon said Sites Number Two and Three or any or either of them. But this defendant admits that on or about the 30th of June, 1908, plaintiff paid to the Fish Commissioner a license fee exacted by the Fish Commissioner of the State of Washington for licenses number 2391, 2392 and 2393; and that thereupon said Fish Commissioner issued to plaintiff three licenses to operate seines in the Columbia River, numbered respectively, 2391, 2392, and 2393; and defendant denies that thereupon plaintiff was entitled to operate three seines or any seine in the waters of the Columbia River within the State of Washington, for a period of one year thereafter, or at any time or at all and defendant denies that plaintiff was entitled to operate said three seines or any seine or any seine

for the purpose of catching [32] salmon fish in the waters of the Columbia River in front of said Sites Number Two and Three, and below low water, in the waters of the Columbia River, in front of said sites; and defendant denies that plaintiff was at any time or is now entitled to operate any seine for the purpose of catching salmon fish below low water in the Columbia River, in the State of Washington, in front of said Sites Number Two and Three or either of them beyond low water.

This defendant denies that on the 2 of July, 1908, or at any other time or at all that the plaintiff was entitled to operate three seines or any seine whatever in front of said Sites Number Two and Three beyond the line of low tide in the waters of the Columbia River and denies that plaintiff was entitled at said time or at any other time whatever or at all, or that plaintiff is now entitled to operate any seine in front of said Sites Number Two and Three or any or either of them in the waters and channel or in the waters or channel of said Columbia River.

Defendant denies that this defendant or that any of the defendants in the above-entitled action wrongfully and unlawfully or wrongfully or unlawfully or in violation of plaintiff's rights or in violation of the laws of the United States, or in violation of any law, placed in the channel of said navigable water of said Columbia River, in front of plaintiff's leased premises or in front of any leased premises of plaintiff or in front of Sites Number Two and Three as aforesaid, certain obstructions; or that defendants or any of them placed any obstruction in or to the naviga-

tion of said waters or in said waters; and denies that defendants or either of them have placed any obstruction whatever in the channel of said [33] navigable waters of the Columbia River or in the waters of said Columbia River; and denies that plaintiff had any right on July 2, 1908, or at any other time, or that plaintiff now has any right to operate its said seines or any seine under its licenses or otherwise or at all in front of said Sites Number Two and Three, below the line of low tide in the waters of the Columbia River within Pacific County, Washington;

Defendant denies that this defendant or that any of the *of the* defendants on July 2, 1908, or at any other time whatever or at all have placed or maintained any obstruction to the navigation of said waters, consisting of large stones or of any other thing, whatever or at all; and denies that this defendant or that any of the defendants at any time whatever or at all have placed any obstruction in the waters of the Columbia River in front of said Sites Number Two and Three or at any other place whatever in said Columbia River. And denies that this defendant or any of the defendants at any time whatever or at all, have placed any obstructions of any character whatever in the waters of said Columbia River at any place in said water whatever; and denies that this defendant or that any of the defendants in any manner whatever or at all have prevented plaintiff from operating a seine on said Sites Number Two and Three; and denies that this defendant or that any or either of the defendants have excluded

the public generally, or the plaintiff or any other person from operating either gill nets, drift nets or seines or any or either of them in the waters of said Columbia River, excepting that defendant admits that on the 2 of July, 1908, he was the owner of and engaged in the operation of two set nets in the waters of the Columbia River in Pacific County, Washington, on the [34] south side of said Sand Island, and that said set nets and each of them were operated by him for the purpose of catching salmon fish under licenses issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908, and that the number of said licenses owned by him, and under which said set nets were operated are numbers 1431 and 1432; and that the same were duly issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that this defendant paid to the Fish Commissioner of the State of Washington the fee exacted and required by law for said fishing appliances and that said set net number 1431 was situated in the waters of the Columbia River at a point about 200 feet in an easterly direction from what is known as and called "Great Republic Wreck" in front of said Sand Island, in Pacific County, Washington, and number 1432 was about 700 feet easterly from said point; and that each of said set nets were situated in front of Sand Island, beyond the line of ordinary low tide, and also beyond the line of extreme low tide; and between the point of extreme low tide and the adjacent channel of said Columbia River, and that said set nets and each of them were located by a stone anchor,

weighing about 300 pounds, to which was attached a 7/16 inch chain about five feet long, which was clamped to a wire rope about 25 feet long, to which was attached a cedar buoy about 4 feet long and 8 inches square and upon which buoy was securely fastened the license number of each location; and that said nets were operated on the 2d day of July, under the license number 1431 and 1432, and said licenses were issued by the Fish Commissioner on the 15th of April, 1908, in consideration of the payment of the lawful amount required by law for a fish license for each set net, to wit: The sum of \$2.50, and each of said licenses bore and [35] bears the number and contains the name of the person to whom said licenses and each of them was granted.

This defendant further avers and also admits that under and pursuant to said license and the laws of the State of Washington, this defendant did, on or about the 16th of June, 1908, cause the location for said set nets and each of them to *to* be made by securely anchoring a buoy on each location as herein described, upon each of which buoys he posted and caused to be posted the number of said license under which *under which* said set net was operated; and said set nets nor neither of them, did not occupy more than one-third of the width of said Columbia River; that at the same place and location where affiant was fishing and operating his said set nets under licenses number 1431 and 1432, his predecessors in interest fished and operated said locations, for the purpose of catching salmon fish with fishing appliances authorized by the laws of the State of Washington, under licenses duly issued by

the Fish Commissioner of the State of Washington, for the year 1902, and during the fishing seasons of each and every year since said year up to and including the year 1907.

That this defendant was fishing and operating his said set nets under licenses numbered 1431 and 1432 as aforesaid, at the time that he was enjoined by order of this Court in this action or proceeding.

That defendant had located and was operating, occupying and fishing said locations with his said set nets, long prior to the time that the plaintiff commenced fishing on said locations, and grounds, with its said drag seines, as alleged in plaintiff's amended complaint, for that plaintiff did not commence fishing on said grounds and locations until on or about the 3d of July, [36] 1908.

Defendant further answering avers and says: That under the laws of the State of Washington, defendant is entitled to and has the sole, prior and exclusive right to the location now occupied by defendant's said set nets, and is entitled to the sole, prior and exclusive right to fish on said locations for salmon fish; and this defendant was fishing for salmon fish on said locations and had selected and located said locations long prior to the time that plaintiff commenced to fish; and that defendant was operating his said set nets for the purpose of catching salmon fish on said locations, at the time that this Court enjoined him; and that this defendant is entitled to the lateral passageway of at least 300 feet and an end passageway of at least 30 feet, between his said set nets, and each of them and all other fishing appliances.

Defendant further says and avers: That defendant was until enjoined by the order of this Court, operating his said set nets, in the usual way and in the only manner in which they can be fished and operated, and in no way and in no manner interfering with the property leased by plaintiff, even if the Court should find that plaintiff had a lease to said property; and said set nets are fished and operated solely and entirely from boats plying upon the waters of the said Columbia River, at a point beyond extreme low tide; and in so fishing said set nets, neither the defendants nor said set nets trespassed upon any lands or shore lines leased by plaintiff.

Defendant further avers: That his said set nets as located and fished by him did not and will not obstruct or interfere with navigation in said river, for the purpose of trade or commerce, or for any other purpose for that said set nets were so constructed [37] and will be so constructed that they will not extend to the adjacent channel of said river, and the water at the present location of said set nets is not to exceed six feet in depth at low tide.

Defendant further avers; that he located his said set net locations and commenced fishing the same long prior to the time and before plaintiff obtained any license from the Fish Commissioner of the State of Washington to fish or operate any drag seines, and prior to the time that plaintiff obtained licenses number 2391, 2392 and 2393, as alleged in its amended complaint, this defendant had located and was fishing and operating for the purpose of catching salmon fish with appliances authorized by the laws of the

State of Washington, and under defendant's said licenses issued to him as aforesaid, by the Fish Commissioner of the State of Washington; and that the place where this defendant was operating and fishing its said set nets was and is in the Columbia River, in Pacific County, Washington, and in that part of said Columbia River, which is described as follows, to wit:

At a point in the Columbia River, in Pacific County, Washington, which is about 200 feet and 700 feet respectively in an easterly direction from the place known and commonly called "Great Republic Wreck" in front of Sand Island, in the Columbia River, beyond the line of ordinary low tide, and also extreme low tide, and beyond the line of extreme low water in said river and between said point of extreme low water and the adjacent channel of said river; and the said set nets and each of them was situated in said Columbia River and in front of, but beyond, said Sand Island, and the same were fished and operated by this defendant, at said place, prior to the time that plaintiff obtained [38] any licenses from the Fish Commissioner of the State of Washington, to fish; and prior to the time that plaintiff commenced to fish at said place. And that these set nets of the defendant's are what the plaintiff in its complaint alleges to be obstructions; and this defendant admits that he fished and operated and was fishing and operating said set nets at the place hereinabove described prior to the first of July, 1908. And that he continued to fish and operate the same, for the purpose of catching salmon fish, until he was

enjoined by the order of this Court in this action.

This defendant admits that plaintiff did on the 2 of July, 1908, attempt to remove, take up and destroy, defendant's said set nets; and that plaintiff kept on doing so, and kept on in its attempt at removing and destroying defendant's set nets and defendant's locations, until finally plaintiff came into this court, and in its complaint alleges that the defendant's set nets constituted and were obstructions, to the navigation of said Columbia River, and obtained from this Court an injunction prohibiting this defendant from fishing and operating his said set nets. But this defendant denies that on the 2 of July, 1908, or at any other time whatever or at all, at great labor or expense or time, or otherwise or at all, that plaintiff removed any obstructions from the Columbia River in front of said Sites 2 and 3 and defendant denies that there were any obstructions in front of said sites and in said river until the plaintiff obstructed same and came there and unlawfully attempted to secure the exclusive right to fish in said Columbia River, and thus obstructed the navigation of said river.

Defendant denies that on the 4 of July, 1908, or at any other time, that defendant wrongfully and unlawfully and in [39] violation of the laws of the United States, placed any obstructions in front of said premises; and defendant denies that he ever placed any obstruction at any time, whatever, or at all of any character, in said Columbia River, or in front of said premises. But defendant admits and he also avers as follows:

That he fished and operated his said set nets for the purpose of catching salmon fish under licenses issued by the Fish Commissioner of the State of Washington, and numbered 1431 and 1432, and which said licenses were issued to defendant on April 15, 1908; and being the same licenses hereinabove described by defendant. And that number 1431 was situated at a point about 200 feet in an easterly direction from what is known and called "Great Republic Wreck" in front of Sand Island, in the Columbia River, in Pacific County, Washington. And that number 1432 was situated about 700 feet easterly from said point.

This defendant alleges that each of said set nets were situated in front of said Sand Island, beyond the line of ordinary low tide and also beyond the line of extreme low tide and between the point of extreme low tide and the adjacent channel of said river; and the same were located by a stone anchor, weighing about 300 pounds, to which was attached a piece of 7/16 inch chain, about five feet long, which was clamped to the wire rope about 25 feet long to which was attached a cedar buoy about four feet long and eight inches square, and upon which said buoy was securely fastened the license number of each said location.

And this defendant admits and also avers as follows: That he was operating said set nets under said licenses for the purpose of catching salmon fish in the waters of the Columbia River, in Pacific County, Washington, at the place hereinabove stated by defendant; and that he continued to operate and fish [40] said set nets under said licenses for the

purpose of catching salmon fish until he was enjoined from so doing by this Court in this action.

And this defendant alleges that these set nets are what the plaintiff in its complaint pretend and charge to be obstructions. But this defendant denies that the same were placed from the shore of said Sites 2 and 3 for that this defendant alleges that the same were placed, that is, that said set nets were situated in the waters of said Columbia River, in front of said Sand Island, beyond the line of ordinary low tide and also beyond the line of extreme low tide and between the point of extreme low tide and the adjacent channel of said river, and that the same were not upon said Sites Number Two and Three or any part thereof; and that this defendant alleges that he had and still has a prior right to fish for fish in the waters of said Columbia River, under said licenses; and that the plaintiff does not have any right to fish in the waters of said Columbia River, at the places where said set nets were located without leaving for this defendant's said set nets the end and also the lateral passageway required by the laws of the State of Washington.

This defendant denies that said set nets constituted any obstructions to the waters of said navigable river; and denies that they were so placed as to prevent the free ingress to said Sand Island, or any part thereof; and denies that said set nets were so placed as to prevent free egress from said Sand Island, or any part thereof; and denies that they were so placed as to interfere with or prevent free access to said Sand Island, or any part thereof.

And this defendant denies that said set nets or

either of them constitute any obstruction whatever to the navigable [41] waters of said Columbia River; and denies that said set nets or any or either of them was or are so placed in said Columbia River as to prevent ingress to said Sand Island, or said Sites Number Two and Three or any part thereof; and denies that said set nets were or are so placed in said Columbia River, as to prevent egress from said Sand Island, or said Site Number Two and Three or any part thereof.

This defendant denies that he had or placed any obstruction in said Columbia River at any place whatever in said river, and denies that he ever at any time or place whatever placed or caused to be placed any obstructions, or obstruction whatever, in said Columbia River or in front of Sites Two or Three or in front of Sand Island or any part thereof.

This defendant denies that this defendant or the defendants or either of them threaten to and will unless restrained by this Court, continue to place any obstructions in said waters in front of said premises; and denies that this defendant or any of said defendants will, unless restrained by this Court, place any obstruction whatever in said waters; and denies that this defendant or any of said defendants threaten to or that any of them will use or employ or that any of them will use and employ any obstruction in said waters of said river, excepting that this defendant admits that unless restrained by the order of this Court, that he will continue to fish for salmon fish, during the fishing seasons of the year 1908 and future years, and operate said two set nets, in the waters of

said Columbia River in front of said Sand Island at the place in said waters where the same were at the time of the commencement of this action, as herein in this answer alleged.

But this defendant denies that said set nets or any or either of them, or any part thereof is an obstruction to navigation; or that the same will be an obstruction to navigation in the waters of said Columbia River. [42]

This defendant denies that his said two fishing nets are of no practical use; and denies that they are of no use, but on the contrary avers and says: That the same are of much value and of much profit to this defendant, for the purpose of catching salmon fish, for that salmon fish are of much value and if defendant is permitted to operate the same, he will catch many valuable salmon fish therein.

This defendant denies that said fishing nets are placed or used in the waters of said Columbia River for the purpose of annoying plaintiff or that the same are placed in the waters of the Columbia River for the purpose of preventing plaintiff from operating its seines or for the purpose of interfering with or obstructing free ingress to and the free egress from said Sand Island. But on the contrary, this defendant alleges, says and avers: That this defendant has a prior right to fish for salmon fish his said two set nets in the waters of the Columbia River, in Pacific County, Washington, at the place where the same were at the time of the commencement of this action, and that plaintiff has no right to operate its seines upon or over the locations of defendants said two set

nets, or any or either of them; and this defendant denies that his set nets were not placed in said waters in good faith; and denies that any or either of them is an obstruction to the navigation of said river.

Defendant denies that he has obstructed or that he intends to obstruct the navigation of said Columbia River, in any manner whatever or at all; and denies that he ever placed any obstruction in the waters of said Columbia River; and denies that he intends to place any obstruction whatever in the waters of the Columbia River; defendant admits that he will, unless restrained by the order of this Court, continue to fish and operate [43] for the purpose of catching salmon fish, his two said set nets, under said licenses as aforesaid, during the fishing seasons of the year 1908 and future years. But this defendant denies that said set nets or any or either of them or any part of any or either of them is an obstruction or constitutes an obstruction, or interfered with the ingress to and the egress from said Sand Island or any part thereof.

That as to whether or not the plaintiff has expended, for the purchase of seines or appliances necessary to conduct seining operations on said premises and shores, \$15,000.00, this defendant has not sufficient knowledge or information on which to base a belief and therefore denies the same.

That as to whether or not plaintiff has employed and now has in its employ and had in its employ at the time of the commencement of this action thirty-four men, this defendant does not have any knowledge or information on which to base a belief, and

therefore denies the same, excepting that defendant admits that plaintiff has employed a large number of men.

But this defendant denies that plaintiff has any right to conduct any seining operations in front of said Sites Two and Three in the waters of the Columbia River, beyond the line of low tide or low water in said river.

This defendant denies that it is necessary for plaintiff to use, keep or care for twenty-four horses or any number of horses in operating said seining ground; and denies that plaintiff has any right to fish for salmon fish with seines in the waters of said Columbia River beyond the line of low water in said Columbia River, in front of said Sand Island, or in front of said Sites Number Two and Three.

This defendant denies that plaintiff is required to [44] pay a rental for said premises in the sum of \$5,175.00 per annum or any other sum whatever or at all, excepting that this defendant admits that the Secretary of War of the United States, did purport to lease to plaintiff, for an annual rental of \$5,175.00, those certain sites mentioned hereinabove in this answer as Sites Number Two and Three, but this defendant denies that said Site Number Two extends beyond the line of ordinary low water, even if the Secretary of War had the right to lease the same to plaintiff; and this defendant denies that said Site Number Three extends beyond the line of low water, in said Columbia River, even if the Secretary of War of the United States had the right or authority to lease said site to plaintiff; but this defendant denies

that the Secretary of War had any right or authority to lease said sites or any part thereof to the plaintiff.

Defendant admits that the salmon fish in the Columbia River are of great value and ascend the river only at certain intervals during each year, and were at the commencement of this action, and are now in the waters of the said Columbia River, in great numbers.

This defendant denies that defendants or any or either of them ever maintained or ever intend to maintain any obstruction in the waters of the Columbia River, excepting that defendant admits that this defendant intends, unless restrained by the order of this Court, to fish for salmon fish his said two set nets hereinabove in this answer mentioned and alleged.

Defendant denies that unless restrained and enjoined by process of this Court that the alleged damage mentioned in plaintiff's complaint will be committed or that any act of defendant will be a damage to the complainant, or that any action of defendant will produce irreparable damage to the complainant.

[45]

Defendant denies that any action of defendant prevents plaintiff from the use of said locations numbered two or three or any or either of them or any part thereof; and defendant denies that any action of defendant will prevent the plaintiff from using its seines on said Sites Two or Three or any or either of them; and defendant denies that any action of defendant will damage the complainant to the amount of many thousands of dollars, or to any amount what-

ever, or at all; and denies that complainant will be damaged by the defendant's acts or act in any manner whatever or at all.

Defendant admits that it is impossible to estimate the number of fish that will be caught in the fish net or other appliance, but this defendant denies that complainant has any right whatever to fish for salmon fish with seines, on location of defendant's said set nets or any or either of them.

Defendant denies that if this defendant is permitted to fish his said two set nets that plaintiff will not be able to use said Sites Number Two or Three or to use its seines on said Site Number Two and Three; but this defendant denies that plaintiff has any right whatever to use his said seines or any or either of them in the waters of the Columbia River, for the purpose of catching salmon fish in said waters, or for any other purpose beyond the line of low water in front of Sand Island, and said Sites Two and Three herein mentioned; and defendant denies that plaintiff has any right to use any seines whatever in the waters of the Columbia River, for the purpose of catching salmon fish in front of Site *Number or* Three, or any or either of them, beyond the line of low water; and denies that plaintiff has any right to use its seines for the purpose of catching salmon fish on the location of this defendant's said two set nets, or any or [46] either of them.

This defendant denies that he has trespassed upon any property or any rights or franchises of plaintiff; and denies that he has ever obstructed at any time whatever or at all, or that he will daily or other-

wise, or at all, or at any time, whatever or at all, place any obstruction in the waters of the Columbia River at any place whatever in said river. But this defendant admits that unless restrained from so doing by the order of this Court, that he will daily continue to exercise the exclusive right of fishery in front of Site Number Two and Three in front of said Sand Island, with his said set nets, below the line of low water, in the waters of the Columbia River, for the purpose of catching salmon fish; and this defendant in this connection says and avers: 'That this defendant has the exclusive right of fishery in front of said premises with his said two set nets at the location of said two set nets; and that he will continue to fish his said two set nets at the locations and at the place where the same were located at the time of the commencement of this action, unless restrained by the order of this Court, for this defendant alleges that the plaintiff has trespassed upon the right of fishery of this defendant.

This defendant denies that he has ever harrassed or annoyed, or that he will continue to harrass or annoy plaintiff, or that he will prevent plaintiff from ingress to or egress from said premises, excepting that this defendant admits that he will unless restrained by the order of this Court, continue to fish for salmon fish in the waters of the Columbia River within Pacific County, Washington, and below the line of low tide, in front of said Site Two and Three of his said two set nets, under license duly issued by the Fish Commissioner of the State of Washington, [47] and at the places where said two set nets were

located at the time of the commencement of this action, as hereinabove in this answer stated, unless restrained by the order of this Court.

This defendant denies that any emergency exists; and denies that plaintiff is entitled to a preliminary injunction, or any injunction at all, enjoining defendants, or either of them, from maintaining any obstruction; and denies that defendants, or any or either of them had or maintained any obstruction whatever in front of said premises or in waters adjacent thereto or in the waters of the Columbia River; and this defendant denies that he ever maintained any obstruction whatever in the waters of the Columbia River, in Pacific County, Washington, or any other place; and this defendant denies that he ever prevented plaintiff's free ingress to and egress from said Sand Island; and denies that he ever prevented or interfered with the operating of plaintiff's said seines on said Site Two and Three, or any or either of them, or any part thereof; and denies that he ever interfered with or that he intends to interfere with plaintiff from using said seines or any or either of them upon said Site Number Two or Three in said Sand Island.

But this defendant admits that he intends to operate his said two set nets for the purpose of catching salmon fish in the waters of the Columbia River, in Pacific County, Washington, in front of Sites Number Two and Three and at the locations at which said set nets were at the time of the commencement of this action, during the fishing season of this year, and future years, unless restrained by the order of

this Court, but said defendant avers and says: That his said set nets were not upon said Site Number Two and Three, or any part thereof, and that neither of said set nets nor any part thereof were [48] upon any part of said Sand Island, for that said set nets were in the waters of the Columbia River, below low tide and below low water, and did not extend out to the channel or to the main ships channel of said Columbia River, in Pacific County, Washington; and this defendant denies that said set nets are or any or either of them or any part thereof was an obstruction to or interfered with the navigation of said Columbia River, or waters thereof; and denies that the same interfered with or prevented ingress to or egress from said Sand Island, or any part thereof.

Defendant avers and says: That his two set nets hereinabove described and mentioned, are the alleged obstructions of which plaintiff in its complaint complains; and this defendant denies that the same were or are, or that the same will be, any obstruction to the navigation to the waters of the Columbia River, or to said waters, or that the same or any or either of them, or any part thereof, were or will be or constitute any obstruction.

Defendant denies that said two set nets were placed in the waters of the Columbia River for the purpose of harrassing or annoying plaintiff; and denies that the same were placed in the waters of the said Columbia River for the purpose of preventing plaintiff from ingress to or egress from said premises; and denies that the same were placed in the waters of the Columbia River for the purpose of preventing plain-

tiff from ingress to or egress from said premises.

That defendant admits that he did not get permission from the Secretary of War of the United States to place his said two set nets in the waters of the Columbia River, for the purpose of fishing for salmon fish in said water; but this defendant [49] denies that said Secretary of War has now or ever had any authority over said two set nets; and denies that the Secretary of War of the United States or that any officer of the Government of the United States has any right or authority to regulate fishing or fishing rights in the waters of the said Columbia River; and denies that it is necessary to receive authority from the Secretary of War or from any officer of the Government of the United States, in order for defendant to fish his said two set nets or fish nets at the location where the same were located at the time of the commencement of this action; and denies that the Secretary of War or any other officer of the United States has any authority whatever to regulate or interfere with fishing for salmon fish in the waters of the Columbia River.

And this defendant denies that plaintiff has any right to raise or litigate any such question in this proceeding.

Defendant, further answering unto said amended bill or complaint of plaintiff, denies all and all manner of unlawful combination and confederacy wherewith he is by the said amended bill charged; without this there is no other matter, cause or thing in said complainant's said amended bill of complaint contained material or necessary for this defendant to make answer to,

and not herein and hereby well and sufficiently answered confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity. [50]

Separate Answer and Defense.

And this defendant, H. S. McGowan, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said amended bill contained, for answer thereto or to as much thereof as this defendant is advised to make answer, says:

And for a further answer and defense unto the cause of action alleged in plaintiff's amended bill of complaint, says, avers, and alleges as follows:

1.

That H. S. McGowan, this defendant, is now and was at all of the times hereinafter in this separate answer and defense mentioned, a citizen of the United States of America, over the age of twenty-one-years, and a citizen and resident of Pacific County, in the State of Washington, and competent to own and operate set nets and other appliances for catching salmon fish in the State of Washington,

and in the Columbia River, in said county and State.

2.

That the plaintiff, Columbia River Packers' Association, is now and was at all the times hereinafter in this separate answer and defense mentioned, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it filed in the office of the Secretary of State of the State of Washington a certified copy of its articles of incorporation, and filed in the office of the Secretary of State of State of Washington, a designation in writing of R. A. Hawkins, as its statutory agent upon whom service of summons or process may be made or had, and that plaintiff is now and was at all [51] of the times hereinafter alleged, a citizen of the State of Oregon.

3.

That heretofore and on the 15th of April, 1908, pursuant to the laws of the State of Washington, this defendant applied to the Fish Commissioner of the State of Washington for a license to operate and fish for salmon fish, two set nets in the waters of the Columbia River, in Pacific County, Washington, and at the place where said set nets were located at the time of the commencement of this action, as hereinafter alleged; and then and there defendant paid the Fish Commissioner the license fee exacted by said Fish Commissioner and the laws of the State of Washington, to wit, the sum of \$2.50 for license number 1431, and \$2.50 for license number 1432. Thereupon said Fish Commissioner, on the 15th of April, 1908, issued and delivered to this defend-

ant, H. S. McGowan, two licenses to operate set nets in the Columbia River, and numbered respectively 1431 and 1432, and thereupon this defendant was entitled of right to operate two set nets for the purpose of catching salmon fish in the waters of the Columbia River, within the State of Washington, from said date and for a period of one year thereafter, and said licenses are under the laws of the State of Washington renewable each year after issuance. That said licenses and each of them contains the name of H. S. McGowan, as the person to whom said licenses were granted, and specifies the number of said set net for which it was issued.

4.

That under and pursuant to said licenses and the laws of the State of Washington, this defendant, H. S. McGowan, did, on or about the 16th of June, 1908, cause the location for said [52] set nets to be made by securely anchoring a buoy on the location, for each set net, upon which he posted, or caused to be posted, the number of the license under which the said respective set nets *was* operated, to wit: Numbers 1431 and 1432.

5.

That the point and place in the waters of the Columbia River, in Pacific County, Washington, where this defendant did, on the 16th of June, 1908, under license No. 1432 locate his said set nets, was and is described as follows, to wit:

At a point in the Columbia River in Pacific County, Washington, which is about 700 feet in a easterly direction from the place known and com-

monly called "Great Republic Wreck" in front of Sand Island, in the Columbia River, beyond the line of ordinary and also extreme low tide, and beyond the line of extreme low water, in said Columbia River, and between said point of extreme low water and the adjacent channel of said Columbia River and said set net is situated in said Columbia River, and in front of but beyond Sand Island; and which said set net and the location thereof was being fished and operated by defendant for the purpose of catching salmon fish under license number 1432, issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that on the 16th of June, 1908, this defendant caused the location of said set net to be made by securely anchoring a buoy in the waters of said river, on the above-described location of his said set net, upon which he, at said time and place, posted and caused to be posted the number of the license under which said set net was operated, to wit: Number 1432, and said set net did not at the time of the commencement of this action nor at any other time, occupy more than one-third of the width of said Columbia River, [53] and did not extend out to the *man* ships' channel thereof, and that the point and place in the waters of the Columbia River in Pacific County, where this defendant did, on or about the 16 of June, 1908, locate his said set net, under license number 1431, is described *and* follows:

At a point in the Columbia River, in Pacific County, Washington, about 200 feet in an *easterly* from what is known and called "Great Republic Wreck" in front of Sand Island, and that said set

net is located in front of said Sand Island, but beyond the line of ordinary low tide and extreme low tide, and beyond the line of low water, and between the point of extreme low tide and low water and the adjacent channel of said river. That each of said set nets was located by use of a stone anchor, weighing about 300 pounds, to which was attached a piece of 7/16 inch chain, about 5 feet long, which was clamped to a wire rope, about 25 feet long, to which was attached a cedar buoy, about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location.

6.

That said license duly authorized and empowered, and authorizes and empowers this defendant to fish and operate said set nets, on said respective locations in the waters of the Columbia River, in the State of Washington and during the entire fishing seasons of 1908 for the purpose of catching salmon fish; and defendant ever since on or about the 16th of June, 1908, has fished and operated each of said set nets, for the purpose of catching *of catching* salmon fish at the locations aforesaid, in the waters of the Columbia River, in Pacific County, Washington, until interfered with by plaintiff, as hereinafter alleged, and until enjoined by the order of the Court [54] in this proceeding.

7.

That each of said set nets was constructed by means of rope, twine, cord, and lead, and the meshes of each of said set nets were more than three inches stretch measure, and was securely fastened so that it re-

maintained in its said location in said Columbia River, and fish were caught in the same, until said set nets and each of them was interfered with by plaintiff as hereinafter averred and alleged, and their operation enjoined by this Court in this proceeding. [55]

8.

That ever since the 16th of June, 1908, this defendant maintained his said locations of his said set nets, and maintained and operated and fished for the purpose of catching salmon fish said set nets and each of them, until interfered with by plaintiff as hereinafter in this answer alleged and averred, and until enjoined by the order of this Court. That said set nets and each of them caught fish and fish were caught therein in the following manner and would now be caught in said set nets and each of them in the following manner, were this defendant permitted by this Court to operate and fish for salmon fish said set nets, and each of them, to wit: Fish were and would be caught in said set nets, and each of them, by entangling themselves in said set nets, and become fast therein, and after they are caught then they are taken out of said set nets by a man or men in small boats, which boat is afloat on the water.

9.

That said defendant was and is entitled to a lateral passageway of at least 300 feet, and an end passageway of 30 feet, between each of his said set nets and all other fishing appliances placed on said Columbia River, or to be placed in said river; and it is a crime under the laws and statutes of the State of Washington, and punishable under said laws, for any person

to construct or own or operate any appliance for the purpose of catching fish and salmon fish, in said waters, without leaving for this defendant's said set nets, and each of them, an end passageway of at least 30 feet and a lateral passageway of at least 300 feet. That between each of said defendant's said set [56] nets, there was on the 16th of June, 1908, at the time of the location of the same, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet, between said set nets and said distance remained between said set nets, until said plaintiff did, as hereinafter alleged, go upon said set nets and upon the locations of this defendant's said set nets.

10.

That this defendant prior to the commencement of this action, expended large sums of money in acquiring the rights of fishing and operating said set nets, and each of them, and that said fishing rights, and set nets and each of them, was of much value and profit to this defendant, by reason of the salmon fish caught and to be caught in this defendant's said set nets during the fishing seasons of the year 1908 and future years. That salmon fish on and in the Columbia River, are of great value and ascend the river in large numbers and schools, at certain periods during each year, and on the 16th of June, 1908, and at all times thereafter, they were in said river in large quantities, and were ascending said river, and will ascend said river in large quantities this and each future year. That salmon fish are of great merchantable value, and defendant was, on June 16th, 1908 and at all times until enjoined by this Court, en-

gaged in the business of operating his said set nets and each of them for the purpose of catching salmon fish therein, for sale in the market, and defendant has derived and expects to derive large profits from his said set nets; and that said set nets and each of them is of much value by reason of the salmon fish caught and to be caught therein. That there is now and there will continue to be, during all of the fishing seasons of the year 1908, and future years, a large number and many valuable salmon fish in said [57] Columbia River, at the place where this defendant's set nets and each of them was located and operated at the time that the operation of said set nets was enjoined by the order of this Court in this proceeding.

11.

That at the same place and location where this defendant's set nets and each of them was located, fished and operated from the 16th of June, 1908, as aforesaid, and until enjoined by the order of this Court in this proceeding, said locations and each of them was fished and operated for the purpose of catching salmon fish during the fishing seasons of the year 1902 and during the fishing seasons of each and every year since said year up to and including the year 1907, by this defendant's predecessors in interest, for that defendant's predecessors in interest fished and operated said locations for the purpose of catching salmon fish with fishing appliances, authorized by the laws of the State of Washington, under licenses duly issued by the Fish Commissioner of the State of Washington, for each and all of the years

1902 and until 1907, inclusive, and this defendant, in the manner required by law, acquired said interest in said locations; and that under said licenses issued as aforesaid, by the Fish Commissioner of the State of Washington, to this defendant, this defendant had located and was operating, occupying and fishing with his said two set nets for salmon fish, his said locations of his said two set nets, long prior to the time that plaintiff attempted to secure a location thereon and long prior to the time that plaintiff commenced fishing on said locations, with its said drag seines, as hereinafter alleged, for that plaintiff did not attempt to secure any fishing location on defendant's said locations, *not* commence fishing [58] on said grounds, and locations, until on or about the 2d or 3d of July, 1908.

That under the laws of the State of Washington, this defendant is entitled to the sole, prior and exclusive right to the locations which were occupied by this defendant's said set nets, at the time of the commencement of this action; and was then and is now entitled to the sole, prior and exclusive right to fish on said locations, for salmon fish, with his said set nets, during the fishing season of this and future years.

12.

That defendant, at the time of the commencement of this action, and ever since the 16th of June, 1908, was fishing and operating said set nets, in the usual way, and in the only manner in which they could be fished and operated for the purpose of catching salmon fish; and was in no way, and in no manner, inter-

fering with the Sites Number Two or Three which plaintiff alleges in its complaint it leased, for defendant's said set nets were and will be fished and operated solely and entirely from boats upon the waters of said Columbia River, at a point beyond low tide and low water if permitted by this Court and in so fishing said set nets, defendant never did and defendant does not intend to and it is not necessary to trespass or go upon or over said Sites Number Two and Three or any part thereof, for that said sites do not extend beyond low waters in the waters of the Columbia River.

13.

That said set nets as located and fished by this defendant did not, and of this Court permits them to be fished and operated, will not interfere with navigation in said river, [59] for the purpose of trade and commerce, or for any other purpose, for which the navigation of said river is used or can be used, for that said set nets were so constructed as not to extend to the adjacent channel of said river, and the water at the place of the location of said set nets, does not exceed six feet in depth at low tide, and neither of said set nets by lead or any parts thereof extended or occupied more than one-third of the width of said river, but occupied much less than one-third of the width of said river.

14.

That each of this defendant's said set nets and exclusive right to fish same were and are of the reasonable value of \$10,000.00, and said set nets and each of them catch a great many valuable salmon fish, and if

this defendant is permitted to fish and operate them they will catch a great many valuable salmon fish, amounting to many thousand dollars' worth, but the exact amount or value it is impossible to determine; that salmon fish are of great mercantile value, and that during the fishing seasons of the year 1908 and future years, this defendant, if permitted to operate his said set nets will catch therein many valuable salmon fish of great value and worth many thousand dollars, but the exact amount of salmon fish, or the value of the salmon fish that defendant would catch in said nets cannot be estimated or computed.

15.

That neither of defendant's said set nets or any part thereof were at any time an obstruction to navigation in said Columbia River. And if defendant is permitted to operate said set nets, at the place and location where the same were at the time of the commencement of this action, the same will not constitute *be* an obstruction, in or to the navigable waters of [60] said Columbia River nor to the navigation of said river. That no part of either of defendant's said set nets or the said buoys which mark the locations thereof were at any time any obstruction in or to the navigation of said Columbia River, for that said set nets, and the locations thereof, were not in the navigable portions of said river; for the water at the place where said set nets were located at the time of the commencement of this action, of said river, does not exceed six feet in depth at low tide, and said set nets or any or either of them did not extend out to the channel of said river, nor to the part of said

river used by boats or vessels in plying the waters of the Columbia River, for the purpose of trade or commerce.

16.

That neither of defendant's said set nets nor any part thereof was upon any part of said Site Number Two or Three or any part thereof, which plaintiff in its complaint alleges that it leased from the Secretary of War of the United States. And the place where said set nets and each of them was located was not and is not upon said Site Two or Three or any part thereof. That said set nets nor the operating and fishing of the same by this defendant, did not interfere with or prevent plaintiff from ingress to and egress from said Sites Number Two and Three of Sand Island, mentioned in plaintiff's complaint. And if defendant is permitted to operate said set nets at the place where the same were located at the time of the commencement of this action, the same will not interfere with or prevent plaintiff from ingress to or egress from said Sand Island.

17.

That the defendant intends to and will fish and operate, for salmon fish, said set nets at the same place and location [61] where they were located, on or about the 16th of June, 1908, if permitted by this Court, and unless restrained and prohibited by this Court in this proceeding upon final hearing. That the said set nets of this defendant were and constitute obstructions and are the things which plaintiff alleges in its complaint were and constitute obstructions and are the things of which the plain-

tiff in its complaint complains.

18.

That while this defendant was operating and fishing for salmon fish, his said set nets and each of them, at the location and place where the same were located in the waters of the Columbia River in Pacific County, Washington, as aforesaid, and on or about the second or third of July, 1908, and at other dates and times since said date, the complainant and plaintiff in the above-entitled action, its agents, officers, and servants, unlawfully and wrongfully, and without the consent of this defendant, entered upon the lateral passageway and location and also upon the end passageway and location of defendant's said set nets, and of each of them, and upon and over the location of said set nets, and each of them, and then and there unlawfully and wrongfully, and without the consent of this defendant, with drag seines did fish with said drag seines for the purpose of catching salmon fish in said seines on the location of this defendant's said set nets and each of them, and did catch salmon fish in their said drag seines, which otherwise would have been caught in defendant's said set nets, and each of them; and ever since said time, the plaintiff has wrongfully and unlawfully, and without the consent of this defendant, daily fished for the purpose of catching salmon fish, with its said drag seines, upon the lateral passageway and location and also upon the end passageway and location, of said defendant's said set nets, and each of them, [62] and upon and over the said set nets and each of them, and are now catching salmon fish in its said drag seines, which would

otherwise be caught in defendant's said set nets, and each of them, were defendant permitted to operate and fish his said set nets, by this Court; that thereby, complainant and plaintiff is irreparably damaging and injuring this defendant, and that the damages have and will amount to many thousands of dollars, but it is impossible to measure said damages in money, for it is impossible to say how many salmon fish plaintiff would catch in said drag seines, or how many fish it will daily catch therein, or how many salmon fish this defendant would catch in his said set nets if permitted to operate the same by Court, but defendant alleges that up to the present time he has been damaged by reason thereof in the sum of at least \$20,000.00.

19.

That the plaintiff, its agents, officers and servants, will daily continue to fish for salmon fish, with said drag seines, upon the location of this defendant's said set nets and upon and over said set nets, and upon and over the lateral location and passageway of said defendant's said set nets, and each of them and upon and over the end location and passageway of said defendant's said set nets and each of them, and over said defendant's said set nets and each of them, during the entire fishing season of the year 1908 and future years, with plaintiff's said drag seines, for the purpose of catching fish in said drag seines, unless restrained by this Court.

20.

That said trespass, herein complained of, and which has been and is now being committed by the

plaintiff, its agents, officers, and servants, as aforesaid, will, unless restrained, [63] continue daily and will prevent this defendant from fishing for salmon fish said set nets, and each of them, and that if plaintiff is permitted to maintain and fish its said drag seines, as aforesaid, this defendant will not be able to use or fish for salmon fish in said waters of said Columbia River, in Pacific County, Washington, his said set nets, or either of them, and this defendant will thereby be irreparably damaged; and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money for it is impossible to ascertain how many fish this defendant would catch in his said set nets during the fishing season of this and future years if the plaintiff did not fish for salmon fish upon and over the location of defendant's said set nets, and if the plaintiff did not prevent this defendant from fishing and operating this defendant's said set nets, and each of them.

21.

That on the second and third of July, 1908, and ever since said time and at the present time, the plaintiff endeavored to prevent and now endeavors to prevent this defendant from fishing and operating his said set nets for the purpose of catching salmon fish at the location and place where they were located as aforesaid, at the time of the commencement of this action; and that on the second and third days of July, 1908, plaintiff claimed, and ever since said time has claimed and now claims, the exclusive right of fishery and the exclusive right to fish for salmon

fish at the place where this defendant's said set nets were fished and operated at the time of the commencement of this action; and endeavored to exclude this defendant and prevent this defendant from fishing his said set nets and each of them, at the location as aforesaid; and that plaintiff [64] will continue to exercise the exclusive right of fishery on and over defendant's said set nets, and at the place where the same were located at the time of the commencement of this action; unless restrained by this Court and will daily thus continue to harass and annoy this defendant; and will continue to endeavor to prevent and will prevent this defendant from fishing and operating his said set nets and each of them, unless restrained by this Court.

22.

That the plaintiff and complainant threaten to and will, unless restrained by this Court, continue daily to fish and operate, for the purpose of catching salmon fish, its said drag seines, and other fishing appliances, upon the lateral location and also upon the end passageway of defendant's said set nets and each of them, and on and over said set nets; and threaten to and will, unless restrained by this Court, prevent this defendant from fishing or operating his said set nets, for the purpose of catching salmon fish; and that the plaintiff will, unless restrained by the order of this Court, exercise the exclusive right of fishery at the place where defendant's set nets were situated at the time of the commencement of this action; and will, unless restrained by the order of this Court, prevent this defendant from ever fishing or

operating, for the purpose of catching salmon fish, said set nets or any or either of them.

23.

That this defendant does not have a plain, speedy or adequate remedy at law for the redress of the grievances herein complained of by this defendant.

24.

That an emergency exists and this defendant is entitled [65] to a permanent injunction forever enjoining plaintiff from maintaining or operating said seines or any or either of them on the lateral location and end passageway of any of defendant's said set nets, and from interfering with this defendant's right to fish and operate defendant's said nets.

WHEREFORE, this defendant, having fully answered, confessed, traversed and denied all matters in the said amended bill of complaint material to be answered, according to his best knowledge and belief, prays this honorable Court to enter its judgment and decree; that plaintiff take nothing by its said action, and that this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained; and that the Court grants unto this defendant such other further and separate relief in the premises as to this Court may seem meet and in accordance with equity.

H. S. McGOWAN,

Defendant.

WELSH, WELSH, & O'PHELAN,

Attorneys and Solicitors for Defendant H. S. McGowan, Residence and Address South Bend, Pacific County, Washington.

State of Washington,
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say :

That I am one of the defendants in the above-entitled action and proceeding; that I am answering defendant herein; that I have read the above and foregoing answer, and said affirmative [66] answer and defense, and know the contents thereof, and that each and every allegation made and thing therein contained is true. Excepting as to such matters and things as are alleged are based on my information and belief, and to those matters and things, I verily believe the same and the whole thereof to be true.

H. S. McGOWAN. [Seal]

Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1908.

JOHN T. WELSH,

Notary Public for the State of Washington, Residing at South Bend, in Said State. [67]

Cross-bill and Complaint.

For a cross-bill and for affirmative relief, this defendant H. S. McGowan, your orator, shows to the honorable Judges of the Circuit Court of the United States of America, in and for the Western District of Washington, Western Division, the following facts, and your orator avers, says and alleges, as follows:

1.

That H. S. McGowan, this defendant, your orator is now, and was at all of the times hereinafter in this separate answer and defense mentioned, a citizen of the United States of America, over the age of twenty-one years, and a citizen and a resident of Pacific County, in the State of Washington, and competent to own and operate set nets and other appliances for catching salmon fish in the State of Washington, and in the Columbia River, in said county and State.

2.

That the plaintiff, Columbia River Packers' Association, is now and was at all the times hereinafter in this separate answer and defense mentioned, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and that it filed in the office of the Secretary of State of the State of Washington, a certified copy of its articles of incorporation, and filed in the office of the Secretary of State of the State of Washington, a designation in writing of R. A. Hawkins, as its statutory agent upon whom service of summons or process may be made or had, and that plaintiff is now and was at all of the times hereinafter alleged, a citizen of the State of Oregon. [68]

3.

That heretofore and on the 15th of April, 1908, pursuant to the laws of the State of Washington, this defendant, your orator, applied to the Fish Commissioner of the State of Washington, for licenses to operate and fish for salmon fish, two set nets in

the waters of the Columbia River, in Pacific County, Washington, and at the place where said set nets were located at the time of the commencement of this action, as hereinafter alleged; and then and there defendant, your orator, paid the said Fish Commissioner the license fee exacted by said Fish Commissioner and the laws of the State of Washington, to wit, the sum of \$2.50 for license number 1431, and \$2.50 for license number 1432. Thereupon said Fish Commissioner, on the 15th of April, 1908, issued and delivered to this defendant, your orator, H. S. McGowan, two licenses to operate set nets in the Columbia River, and numbered respectively 1431 and 1432, and thereupon this defendant, your orator, was entitled of right to operate two set nets for the purpose of catching salmon fish in the waters of the Columbia River, within the State of Washington, from said date and for a period of one year thereafter, and said licenses are under the laws of the State of Washington renewable each year after issuance. That said licenses and each of them contains the name of H. S. McGowan, as the person to whom said licenses were granted, and specifies the number of said set net for which it was issued.

4.

That under and pursuant to said licenses and the laws of the State of Washington, this defendant, your orator, H. S. McGowan, did on or about the [69] 16th of June, 1908, cause the location for said set nets to be made by securely fastening a buoy on the location, for each set net, upon which he posted, or caused to be posted, the number of the license

under which the said respective set nets *was* operated, to wit: Nos. 1431, 1432.

5.

That the point and place in the waters of the Columbia River in Pacific County, Washington, where this defendant, your orator, did on the 16th of June, 1908, locate his said set nets, under license No. 1432 was and is described as follows, to wit:

At a point in the Columbia River in Pacific County, Washington, which is about 700 feet in an easterly direction from the place known and commonly called "Great Republic Wreck," in front of Sand Island, in the Columbia River, beyond the line of ordinary and also of extreme low tide, in said Columbia River, and the adjacent channel of said Columbia River, and said set net is situated in said Columbia River, and in front of but beyond Sand Island; and which said set net and the location thereof was being fished and operated by defendant, for the purpose of catching salmon fish under license number 1436, issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; and that on the 16th of June, 1908, this defendant, your orator, caused the location of said set net to be made by securely anchoring a buoy in the waters of said river, on the above-described location of his said set net, upon which he, at said time and place, posted and caused to be posted the number of the license under which said set net was operated, to wit: Number 1432, and said set net did not at the time of the commencement of this action, nor at any other time, occupy more than one-

third of the width [70] of said Columbia River, and did not extend out to the main ships' channel thereof, and that the point and place in the waters of the Columbia River in Pacific County, Washington, where this defendant, your orator, did, on or about the 16th of June, 1908, locate his said set net, under license number 1431, is described as follows:

At a point in the Columbia River, in Pacific County, Washington, about 200 feet in an easterly direction from what is known and called "Great Republic Wreck" in front of Sand Island, and that said set net is located in front of Sand Island, but beyond the line of ordinary low tide and extreme low tide, and beyond the line of low water, and between the point of extreme low tide and low water, and the adjacent channel of said river. That each of said set nets was located by use of a stone anchor, weighing about 300 pounds, to which was attached [71] a piece of 7/16 inch chain, about 5 feet long, which was clamped to a wire rope, about 25 feet long, to which was attached a cedar buoy, about 4 feet long and 8 inches square, upon which buoy was securely fastened the license number of each location.

6.

That said license duly authorized and empowered, and authorizes and empowers this defendant, your orator, to fish and operate said set nets, on said respective locations in the waters of the Columbia River, in the State of Washington, and during the entire fishing seasons of 1908 for the purpose of catching salmon fish; and defendant, your orator, ever since on or

about the 16th of June, 1908, has fished and operated each of said set nets, for the purpose of catching salmon fish at the locations aforesaid, in the waters of the Columbia River, in Pacific County, Washington, until interfered with by plaintiff as hereinafter alleged, and until enjoined by the order of the Court in this proceeding.

7.

That each of said set nets was constructed by means of rope, twine, cord, and lead and the meshes of said set nets was more than three inches stretch measure, and was securely fastened so that it remained in its said location in said Columbia River, and fish were caught in the same, until said set nets and each of them was interfered with by plaintiff as hereinafter averred and alleged, and their operation enjoined by this Court in this proceeding.

8.

That ever since the 16th of June, 1908, this defendant, your orator, maintained his said locations of his said set nets, and maintained and operated and fished for the purpose [72] of catching salmon fish said set nets and each of them, until interfered with by plaintiff as hereinafter in this answer alleged and averred, and until enjoined by the order of this Court. That said set nets and each of them caught fish and fish were caught therein in the following manner, and would now be caught in said set nets and each of them in the following manner, were this defendant, your orator, permitted by this Court to operate and fish for salmon fish said set nets, and each of them, to wit: Fish were and would be caught

in said set nets, and each of them, by entangling themselves in said set nets, and becoming fast therein, and after they are caught, then they are taken out of said set nets by a man or men in small boats, which boat is afloat on the water.

9.

That said defendant, your orator, was and is entitled to a lateral passageway of at least 300 feet and an end passageway of 30 feet, between each of his said set nets, and all other fishing appliances placed on said Columbia River, or to be placed in said river; and it is a crime under the laws and statutes of the State of Washington, and punishable under said laws, for any person to construct or own or operate any appliance for the purpose of catching fish and salmon fish, in said waters, without leaving for this defendant's, your orators, said set nets, and each of them, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet. That between each of said defendant's, your orator's, said set nets, there was, on the 16th of June, 1908, at the time of the location of the same, an end passageway of at least 30 feet, and a lateral passageway of at least 300 feet, between said set nets, and said distance remained between said set nets, until said plaintiff did, as [73] *as* hereinafter alleged, go upon said set nets, and upon the locations of this defendant's, your orator's, said set nets.

10.

That this defendant, your orator, prior to the commencement of this action, expended large sums of money in acquiring the rights of fishing and operat-

ing said set nets, and each of them, and that said fishing rights, and said set nets and each of them, was of much value and profit to this defendant, your orator, by reason of the salmon fish caught and to be caught in this defendant's, your orator's, said set nets, during the fishing seasons of the year, 1908 and future years. That salmon fish on and in the Columbia River, are of great value and ascend the river in large numbers and schools at certain periods during each year, and on the 16th of June, 1908, and at all times thereafter, they were in said river in large quantities and were ascending said river, and will ascend said river in large quantities this and each future year. That salmon fish are of great merchantable value, and defendant, your orator, was on June 16th, 1908, and at all times enjoined by this Court, engaged in the business of operating his said set nets, and each of them, for the purpose of catching salmon fish therein, for sale in the market, and defendant, your orator, has derived and expects to derive large profits from his said set nets; and that said set nets, and each of them, is of much value by reason of the salmon fish caught and to be caught therein. That there is now and there will continue to be, during all the fishing seasons of the year 1908, and future years, a large number and many valuable salmon fish in said Columbia River, at the place where this defendant's, your orator's, said set nets and each of them was located and operated at the time that the operation of said set [74] nets was enjoined by the order of this Court, in this proceeding.

11.

That at the same place and location where this defendant's your orator's, set nets, and each of them was located, fished and operated, from the 16th of June, 1908, as aforesaid, and until enjoined by the order of this Court in this proceeding, said locations and each of them was fished and operated for the purpose of catching salmon fish during the fishing seasons of the year 1902 and during the fishing seasons of each and every year since said year up to and including the year 1907, by this defendant's your orator's, predecessors in interest, for that defendant's, your orator's, predecessors in interest fished and operated said locations for the purpose of catching salmon fish with fishing appliances, authorized by the laws of the State of Washington, under licenses duly issued by the Fish Commissioner of the State of Washington, for each and all of the years 1902 and until 1907, both inclusive, and this defendant, your orator, in the manner required by law, purchased said interest in said locations; and that under said licenses issued as aforesaid, by the Fish Commissioner of the State of Washington, to this defendant, your orator, this defendant, your orator had located and was operating, occupying and fishing with his said set nets for salmon fish his said locations of his said set nets, long prior to the time that plaintiff attempted to secure a location thereon and long *prior that* plaintiff commenced fishing on said locations, with its said drag seines, as hereinafter alleged, for that plaintiff did not attempt to secure any fishing location on defendant's, your orator's, said locations nor com-

menced fishing on said grounds, and locations until on or about the 2d or 3d of July, 1908. [75]

That under the laws of the State of Washington, this defendant, your orator, is entitled to the sole, prior and exclusive right to the locations which were occupied by this defendant's, your orator's, said set nets, at the time of the commencement of this action; and was then and is now entitled to the sole, prior and exclusive right to fish on said locations, for salmon fish, with his said set nets, during the fishing season of this and future years.

12.

That defendant, your orator, at the time of the commencement of this action, and ever since the 16th of June, 1908, was fishing and operating said set nets, in the usual way, and in the only manner in which they could be fished and operated for the purpose of catching salmon fish; and was in no way, and in no manner, interfering with the Sites Number Two or Three which plaintiff alleges in its complaint it leased; for defendant's, your orator's, said set nets, were and will be fished and operated solely and entirely from boats upon the waters of said Columbia River, at a point beyond low tide and low water, if permitted by the Court, and in so fishing said set nets, defendant, your orator, never did and defendant, your orator, does not intend to and it is not necessary to trespass or go upon or over said Sites Number Two and Three or any part thereof, for that said sites do not extend beyond low waters in the waters of the Columbia River.

13.

That said set nets as located and fished by this defendant, your orator, did not and if this Court permits them to be fished and operated, will not interfere with navigation [76] in said river, for the purpose of trade and commerce, or for any other purpose, for which the navigation of said river is used, or can be used, for that said set nets, were so constructed as not to extend to the adjacent channel of said river, and the water at the place of the location of said set nets does not exceed six feet in depth at low tide, and neither of said set nets by lead or any parts thereof extended or occupied more than one-third of the width of said river, but occupied much less than one-third of the width of said river.

14.

That each of this defendant's, your orator's, said set nets and the exclusive rights to fish the same were and are of the reasonable value of \$10,000.00, and said set nets, and each of them, catch a great many valuable salmon fish, and if this defendant, your orator, is permitted to fish and operate them they will catch a great many valuable salmon fish, amounting to many thousand dollars' worth, but the exact amount or value it is impossible to determine; that salmon fish are of great mercantile value, and that during the fishing seasons of the year 1908 and future years, this defendant, your orator, if permitted to operate his said set nets, will catch therein many valuable salmon fish of great value and worth many thousand dollars, but the exact amount of salmon fish, or the value of the salmon fish that defendant, your orator, would

catch in said nets cannot be estimated or computed.

15.

That neither of defendant's, your orator's, said set nets or any part thereof, were at any time an obstruction to navigation in said Columbia River. And if defendant, your orator, is permitted to operate said set nets, at the place and [77] location where the same were at the time of the commencement of this action, the same will not constitute or be an obstruction, in or to the navigation of the Columbia River nor to the navigable waters of said river. That no part of either of defendant's, your orator's, said set nets, or the said buoys, which mark the locations thereof, were at any time *any time* any obstruction in or to the navigation of said Columbia River, for that said set nets, and the locations thereof, were not in the navigable portions of said river, for the water at the place where said set nets were located at the time of the commencement of this action *of* said river, does not exceed six feet in depth at low tide, and said set nets or any or either of them did not extend out to the channel of said river, nor to the part of said river used by boats or vessels in plying the waters of the Columbia River, for the purpose of trade or commerce.

16.

That neither of defendant's, your orator's, said set nets, nor any part thereof was upon any part of said Site Number Two or Three or any part thereof which plaintiff in its complaint alleges that it leased from the Secretary of War of the United States, and the place where said set nets and each of them was.

located was not and is not upon said Sites Two or Three or any part thereof. That said set nets nor the operating and fishing of the same by this defendant, your orator, did not interfere with or prevent plaintiff from ingress to or egress from said Sites Number Two and Three of Sand Island, mentioned in plaintiff's complaint. And if defendant, your orator, is permitted to operate said set nets, at the place where the same were located at the time of the commencement of this action, the same will not interfere with or prevent plaintiff from ingress to or egress from said Sand Island. [78]

17.

That the defendant, your orator, intends to and will fish and operate for salmon fish, said set nets at the same place and location where they were located, on or about the 16th of June, 1908, if permitted by this Court, and unless restrained and prohibited by this Court, in this proceeding, upon final hearing. That the said set nets of this defendant, your orator, were and are the things which the said plaintiff alleges in its complaint were and constitute obstructions to the navigation of said river, and are the things of which the plaintiff in its complaint complains.

18.

That while this defendant, your orator, was operating and fishing for salmon fish, his said set nets and each of them at the location and place where the same were located in the waters of the Columbia River, in Pacific County, Washington, as aforesaid, and on or about the second or third of July, 1908, and at other

dates and times since said date, the complainant and plaintiff in the above-entitled action, its agents, officers, and servants, unlawfully and wrongfully and without the consent of this defendant, your orator, entered upon the lateral passageway and location and also upon the end passageway and location of defendant's, your orator's, said set nets, and each of them, and upon and over the location of said set nets, and each of them, and upon and over the location of said set nets, and each of them, and then and there unlawfully and wrongfully, and without the consent of this defendant, your orator, with drag seines, did fish with said drag seines for the purpose of catching salmon in said seines on the location of this defendant's, your orator's, said set nets and each of them, and did [79] catch salmon fish in their said drag seines, which otherwise would have been caught in defendant's, your orator's, said set nets, and each of them; and ever since said time, the plaintiff has wrongfully and unlawfully, and without the consent of this defendant, your orator, daily fished for the purpose of catching salmon fish, with its said drag seines, upon the lateral passageway and location and also upon the end passageway and location, of said defendant's, your orator's, said set nets, and each of them, and upon and over the said set nets and each of them, and are now catching salmon fish in its drag seines, which would otherwise be caught in defendant's, your orator's, said set nets, and each of them, and are now catching salmon fish in its said drag seines which would otherwise be caught in defendant's, your or-

ator's, said set nets, and each of them, were defendant, your orator, permitted to operate and fish his said set nets by this Court; that thereby complainant and plaintiff is irreparably damaging and injuring this defendant, your orator, and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money, for it is impossible to say how many salmon fish plaintiff would catch in said drag seines, or how many fish it will daily catch therein, or how many salmon fish this defendant, your orator, would catch in his said set nets, if permitted to operate the same.

19.

That the plaintiff, its agents, officers and servants, will daily continue to fish for salmon fish, with said drag seines, upon the location of this defendant's, your orator's, said set nets, and upon and over said set nets, and upon and over the lateral location and passageway of said defendant's, your orator's, [80] said set nets, and each of them, and upon and over the lateral location and passageway of said defendant's, your orator's, said set nets, and each of them, and over the end location and passageway of said defendant's, your orator's, said set nets, and each of them, during the entire fishing season of the year 1908 and future years, with plaintiff's said drag seines, for the purpose of catching fish in said drag seines, unless restrained by this Court.

20.

That said trespass, herein complained of, and which has been and is now being committed by the plaintiff, its agents, officers, and servants, as afore-

said, will, unless restrained, continue daily and will prevent this defendant, your orator, from fishing for salmon fish said set nets, and each of them, and that if plaintiff is permitted to maintain and fish its said drag seines, as aforesaid, this defendant, your orator, will not be able to use or fish for salmon fish in said waters of said Columbia River, in Pacific County, Washington, his said set nets, or either of them, and this defendant, your orator, will thereby be irreparably damaged; and that the damages will amount to many thousands of dollars, but it is impossible to measure said damages in money for it is impossible to ascertain how many fish this defendant, your orator, *would in* his said set nets during the fishing season of this and future years, if the plaintiff did not fish for salmon fish upon and over the location of defendant's, your orator's, said set nets, and if the plaintiff did not prevent this defendant from fishing and operating this defendant's, your orator's, said set nets, and each of them.

21.

That on the second and third of July, 1908, and ever [81] since said time and at the present time, the plaintiff endeavored to prevent and now endeavors to prevent this defendant, your orator, from fishing and operating his said set nets for the purpose of catching salmon fish at the location and place where they were located as aforesaid, at the time of the commencement of this action; and that on the second and third days of July, 1908, plaintiff claimed, and ever since said time has claimed and now claims, the exclusive right of fishery and the exclusive right to

fish for salmon fish at the place where this defendant's, your orator's, said set nets, were fished and operated at the time of the commencement of this action; and endeavored to exclude this defendant, your orator, and prevent this defendant, your orator, from fishing his said set nets and each of them, at the locations as aforesaid; and that plaintiff will continue to exercise the exclusive right of fishery on and over defendant's, your orator's, said set nets, and at the place where the same were located at the time of the commencement of this action, unless restrained by this Court; and will daily thus continue to harass and annoy this defendant, your orator, from fishing and operating his said set nets, and each of them, unless restrained by this Court.

21½.

That because your orator has been enjoined in this suit and prevented from fishing for the purpose of catching salmon fish, each of his said set nets, in the waters of the Columbia River, in Pacific County, Washington, and at the locations hereinabove alleged, he has been damaged in the sum of many thousand dollars, but it is impossible to allege or state specifically the exact amount of money in which your orator alleges and avers that he has been damaged in the sum of at least \$20,000.00 up to the present time, as near as your orator can now state and aver.

22.

That the plaintiff and complainant threatened to and will [82] unless restrained by this Court, continue daily to fish and operate for the purpose of catching salmon fish, its said drag seines and other

fishing appliances, upon the lateral location and also upon the end passageway of defendant's, your orator's, said set nets, and each of them, and on and over said set nets; and threatened to and will unless restrained by this Court, prevent this defendant, your orator, from fishing or operating his said set nets, for the purpose of catching salmon fish; and that the plaintiff will, unless restrained by the order of this Court, exercise the exclusive right of fishery at the place where defendant's, your orator's, said set nets were situated at the time of the commencement of this action, and will, unless restrained by the order of this Court, prevent this defendant, your orator, from ever fishing or operating, for the purpose of catching salmon fish, said set nets, or any or either of them.

23.

That this defendant does not have a plain, speedy or adequate remedy at law for the redress of the grievances herein complained of by this defendant, your orator.

24.

That an emergency exists and this defendant, your orator, is entitled to a permanent injunction forever enjoining plaintiff from maintaining or operating said seines or any or either of them on the lateral location and end passageway of any of defendant's, your orator's, said set nets, and from interfering with this defendant's, your orator's, right to fish and operate defendant's, your orator's, said set nets.

WHEREFORE, your orator to the end, that he may obtain relief to which he is justly entitled in the

premises, prays [83] the Court to grant him, a judgment and decree as follows:

1.

That the Court grant to him a writ of subpoena, directed to the said Columbia River Packers' Association, complainant in the above-entitled action, requiring and commanding it to appear herein and answer under oath, to the several allegations in this cross-bill contained.

2.

That complainant be required to set forth any and every adverse interest, claim or demand, in or to the said premises, and upon which your orator's set nets were located at the time of the commencement of the above-entitled action, to the end, that said adverse interest, claim or demand may be justly adjudicated and declared null and void as against this cross-complainant, and your orator; and that the exclusive right to fish and operate your orator's said set nets, on the locations where the same were at the time of the commencement of this action, be established in your orator and confirmed in your orator, as against any and all claims of the said Columbia River Packers' Association.

3.

That your Honors grant unto your orator, this cross-complainant, further judgment and decree as follows:

That this Court decree that an emergency exists in this case and that a preliminary injunction be issued herein, enjoining and restraining the Columbia River Packers' Association, the complainant in the

above-entitled action, and its servants, agents, employees and all persons acting by, through, or under it, from fishing, on the locations of your orator's said set nets, in the Columbia River, in Pacific County, Washington, and from [84] fishing for salmon fish on the locations of said set nets or any or either of them; and from interfering with this defendant in the maintenance and operation of his said set nets; and that upon the final hearing herein that your Honors grant unto your orators a writ of injunction, forever and perpetually enjoining and restraining the Columbia River Packers' Association, its agents, servants, officers and employees, and all persons acting under, or through it, from in any manner interfering with your orator in the operation of your orator's said set nets, and from maintaining operating or fishing for the purpose of catching salmon fish, in any fishing appliances whatever, upon or over the locations of your orator's said set nets in the waters of the Columbia River, and from interfering with the operation of your orator's said set nets, or any or either of them.

31½.

That your orator have a judgment against plaintiff and complainant in the sum of \$20,000.00.

4.

That your orator have such other, and further judgment and decree and relief in the premises as to the honorable Court may seem equitable and just, and for his costs and disbursements herein; and that your orator may have such other or further relief in the

premises as the nature of the circumstances in the case may require.

WELSH, WELSH & O'PHELAN,
Solicitor, Counselor and Attorney for Cross-com-
plainant, and Your Orator, H. S. McGowan,
Residence and Address, South Bend, Washing-
ton.

H. S. McGOWAN,
Your Orator. [85]

State of Washington,
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say:

That I am the cross-complainant and your orator named in the above and foregoing cross-bill and complaint; that I have read the same and know the contents thereof and the same and the whole thereof is true, as I verily believe, and I have signed the said verification.

H. S. McGOWAN.

Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1908.

[Seal]

JOHN T. WELSH,
Notary Public for the State of Washington Residing
at South Bend in Said State.

Filed U. S. Circuit Court, Western District of
Washington. Aug. 28, 1908. A. Reeves Ayres,
Clerk. ———, Deputy. [86]

*In the Circuit Court of the United States for the
Western District of Washington, Western Divi-
sion.*

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and L. N.
STENSLAND,

Defendants.

**Demurrer of Plaintiff to Cross-complaint of
Defendant McGowan.**

The demurrer of Columbia River Packers' Association, plaintiff, to the alleged cross-bill of defendant H. S. McGowan, one of the above-named defendants.

This plaintiff, by protestation, not confessing all or any of the matters and things in the said defendant's alleged cross-bill contained to be true in such manner and form as the same therein set forth and alleged, doth demur to said alleged cross-bill and for cause of demurrer sheweth to the Court,

First: That this honorable Court hath no jurisdiction to entertain said alleged and pretended cross-bill, as a cross-bill, for that it is not the beginning of an independent suit, neither is it pleaded as a defense to plaintiff's cause of suit;

Second: That said alleged cross-bill doth not con-

tain any matter of equity whereon this Court can ground any decree or give to the said defendant any relief against this plaintiff;

Third: That as to all matters and things set forth in said alleged and pretended cross-bill, the said defendant hath right to plead and has pleaded the same in his separate answer to the original bill filed herein.

WHEREFORE and for divers and other good causes of [87] demurrer appearing in the said alleged cross-bill, plaintiff doth demur thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer thereto and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

G. C. FULTON,

Solicitor for Plaintiff.

State of Oregon,

County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn, on oath depose and say that on September 2, 1908, I caused to be deposited in the United States postoffice, at Astoria, inclosed in an envelope duly stamped addressed to Messrs. Welsh, Welsh and O'Phelan, Attorneys at Law, South Bend, Washington, being the attorneys for defendants, a true, full and correct copy of the within and foregoing demurrer.

G. C. FULTON.

Subscribed and sworn to before this 2d day of September, 1908.

[Notarial Seal]

W. M. VAN DUSEN,
Notary Public for Oregon.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Sep. 9, 1908. A. Reeves Ayres, Clerk. —————, Deputy. [88]

In the United States Circuit Court for the Western District of Washington, Western Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSY and L. N. STENSLAND,

Defendants.

Order [or Decree Overruling Plaintiff's Demurrer to Cross-complaint].

Now on this date the above-entitled cause was brought on for hearing before the Court upon the separate demurrers of the plaintiff to the separate cross-bills and complaints of each of the defendants H. S. McGowan, Erick Lindstrom, and J. P. Coyle; the plaintiff appearing by its attorney G. C. Fulton, Esq., and the defendants by their attorneys Messrs. Welsh & O'Phelan, and the Court, after listening to the arguments of their respective counsel, and being fully advised in the premises, overrules each of said demurrers.

IT IS THEREFORE CONSIDERED, ORDERED AND DECREED by the Court that the

demurrers of the plaintiff to the cross-bills and complaint of the defendant J. P. Coyle, and the demurrer of the plaintiff to the cross-bill and complaint of defendant H. S. McGowan, and the demurrer of the plaintiff to the cross-bill and complaint of Erik Lindstrom, be, and they are hereby and each of them is, overruled.

IT IS FURTHER ORDERED that the plaintiff be, and it is hereby allowed twenty (20) days in which to answer to each of said cross-bills.

Dated this 21st day of October, A. D. 1908. [89]

C. H. HANFORD,

Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Oct. 21, 1908. A. Reeves Ayres, Clerk. ———, Deputy. [90]

*In the Circuit Court of the United States for the
Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and L. N.
STENSLAND,

Defendants.

**Answer of Plaintiff to Cross-complaint of Defendant
McGowan.**

Comes now the above-named plaintiff and now and

at all times hereinafter saving to itself all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the defendant, H. S. McGowan's cross-bill and complaint, filed herein in the above-entitled action, and for answer thereto admits, alleges, and denies as follows, that is to say,

I.

This plaintiff answering unto paragraph No. 3 of said cross-bill and complaint admits that the said H. S. McGowan applied to the Fish Commissioner of the State of Washington for licenses to operate three set nets in the waters of the Columbia River, but denies that the said H. S. McGowan, on the 15th of April, 1908, or at any other time whatever, or at all, or pursuant to the laws, or any law, of the State of Washington applied to such commissioner for licenses to operate or fish for salmon fish, or any fish, three set nets, or any set nets, in Pacific County, Washington, at the places, or any place, where said alleged or any set nets, or any set net, was located at the time of the commencement of this action, or elsewhere; and denies that said application covers any [91] particular locality or place or any county. This plaintiff does not deny that said McGowan obtained three licenses to operate two separate set nets and numbered respectively 1431, 1432; but denies that said licenses authorized him to operate the same or either in any particular river or any particular water or confined the same to the Columbia River, but the same were and each was a roving license.

II.

This plaintiff answering unto paragraph No. 4 of said cross-bill and complaint denies that, under and pursuant to said licenses, or any license whatever, or under the laws or any law of the State of Washington, the defendant H. S. McGowan did on or about the 16th of June, 1908, or at any other time whatever, cause the or any location for said alleged set nets, or set net, to be made by securely, or at all, fastening a buoy on the location, or on any location, or for each or any set net, or upon which he posted or caused to be posted the number of the license, or any license, or any number under which the said alleged respective set nets, or either, was operated, or numbered 1431, or 1432, or either thereof or any number, excepting plaintiff admits that said defendant Coyle did place certain obstructions in the waters of the Columbia River immediately in front of said Sites No. 2 and 3 mentioned in plaintiff's complaint, which he called set net locations and falsely represented them to be set net locations, and they are the same obstructions complained of in plaintiff's complaint.

III.

This plaintiff answering unto paragraph No. 5, alleges that it has no knowledge or information sufficient to form a belief as to whether or not the point or place in the waters of the [92] Columbia River in Pacific County where said defendant alleges that on the 16th of June, 1908, he located the said alleged set nets, or either, or under license No. 1432, was located accordingly as in said paragraph described, for that plaintiff is not familiar with the description

of the location as described but alleges that the alleged and pretended set net, set forth and described therein, is one of the obstructions complained of in plaintiff's complaint. This plaintiff also alleges that it has no knowledge or information sufficient to form a belief as to whether or not the description of the exact location of the alleged and pretended set nets under said alleged licenses No. 1431 and 1432 is correct, but avers that the same were located in front of said premises described in plaintiff's complaint and was and is one of the obstructions complained of in plaintiff's complaint. Plaintiff also admits that the point where each of said alleged and pretended set nets are located are below the line of ordinary low water, but denies the same, or either, are beyond the line of extreme low water of the Columbia River; and denies that the same were between the line of extreme low water and the adjacent channel of said Columbia River; and alleges that the same are within the channel of said river, that is the said river is navigable at the point where said alleged and pretended set nets, described in said cross-bill and complaint of H. S. McGowan, are located and were located at the beginning of this action; and denies that the same are beyond Sand Island, but admits the same are in front of said Sand Island; and denies that either of said alleged set nets, or the location thereof, was being fished or operated by defendant H. S. McGowan for the purpose of catching salmon fish or under any license number, or otherwise, than in violation of law and the rights of plaintiff herein; and denies that the Fish Commissioner of the State

of Washington had any right or authority to grant such defendant any right to construct, operate, or maintain either of said alleged and [93] pretended set nets in front of said Sites No. 2 and 3 aforesaid. This plaintiff further denies that on the 16th of June, 1908, or at any other time or at all, said defendant caused the location of said alleged and pretended set net No. 1431 or 1432 or either to be made by securely anchoring a buoy in the waters of said river, or otherwise, or on the location set forth in said answer, or upon which he at the said time, or at all, placed or posted or caused to be posted a number of said alleged licenses, but admits that said defendant did before the first day of July, 1908, prior to the institution of this action, cause certain buoys to be securely anchored in the waters of said river in front of Sites No. 2 and 3, described in plaintiff's complaint, upon which certain numbers were posted, and plaintiff is informed said buoys were numbered 1431 and 1432, and that the placing of said buoys which said defendant wrongfully calls set nets are some of the obstructions complained of in plaintiff's complaint; and this plaintiff further admits that there was attached to each of said alleged and pretended set nets a large stone weighing at least 300 pounds to which was attached rope, wire, and chain; and plaintiff alleges that the same were so firmly anchored and secured that it was impossible to operate any other fishing device in said waters.

IV.

This plaintiff answering unto paragraph No. 6 of said cross-bill and complaint says that it is not true

and denies that said licenses, or either of them or any of them, duly authorized or empowered, or authorizes or empowers defendant to fish or operate said alleged set nets, or either thereof, on said alleged respective locations, or upon any part or portion of the waters or bed of the Columbia River in front of said Sites No. 2 and 3 or between the line of low-water mark and the navigable channel [94] of said river at any time whatever, or at all, or during the entire or any portion of the fishing season of 1908, or any other time whatever, or for the purpose of catching salmon or other fish, or for any purpose whatsoever; and denies that said defendant since or about the 16th of June, 1908, or at any other time whatever, or at all, has fished or operated each or either of said alleged set nets or any set net in front of said Sites 2 and 3 aforesaid for the purpose of catching salmon fish at either of said locations aforesaid until interfered with by plaintiff, or until enjoined by the order of this Court in this proceeding, but on the contrary this plaintiff avers that said alleged set nets were placed by defendant in front of said Sites 2 and 3, described in plaintiff's complaint for the sole purpose of harassing and annoying this plaintiff and preventing plaintiff from operating same on said Sand Island on said sites, and for no other purpose whatever.

V.

This plaintiff, answering unto paragraph No. 7 of said cross-bill and complaint of said defendant H. S. McGowan, denies that each or either of said set nets was constructed by means of ropes or twine or cord

or lead, or that the meshes of each or either of said alleged set nets was more than three inches, stretch measure; and denies that either of said alleged set nets as described in said answer was intended as a set net or fished as such, but admits that each was secured firmly so that it remained as located in said Columbia River until removed by this plaintiff and enjoined by this Court; and denies that any fish were ever caught in either of said set nets, or that they were operated so as to catch any fish.

VI.

This plaintiff answering unto paragraph No. 8 of said [95] cross-bill and complaint denies that ever since the 16th of June, 1908, or at any time whatever, or at all, this defendant maintained his said locations, or either thereof, or of his said alleged set nets or either thereof, or maintained or operated or fished either thereof for the purpose of catching salmon fish, or otherwise, or at all, or until interfered with by plaintiff or until enjoined by the order of this Court, but admits that said alleged set nets as described in plaintiff's complaint were kept and maintained in front of said Sites No. 2 and 3 on said Sand Island as alleged in plaintiff's complaint until removed and further maintenance enjoined by this Court. This plaintiff further denies that said alleged set nets, or either thereof, or each or any of them, caught any fish or any fish were caught therein, or in either thereof in any manner whatever, or in the manner alleged in the said alleged cross-bill and complaint; and denies that any fish would now be caught in any of said set nets, or either of them or

each thereof, in any manner whatever should said defendant be permitted to operate same or either thereof; and denies that fish were or could be caught in either of said set nets or in each of them or in any of them by entangling themselves in any of the set nets or either thereof, or become fast therein, for that the buoys and anchors were utterly incapable of catching any fish and fish could not become entangled in the buoys or the wires or chains or the anchors, and the alleged web attached to said alleged set nets was old and worn and rotten and was only attached at one end leaving it swinging with the winds and tides. Plaintiff admits that if any fish could, by any possible chance, be caught in such contrivances they could very readily be taken out by men in small boats afloat on the water, providing it was high tide but could not be so removed at low tide. [96]

VII.

This plaintiff, answering unto paragraph No. 9 of said cross-bill and complaint, denies that said defendant was or is entitled to a lateral passageway or any passageway of at least 300 feet or any feet whatever, or any lateral passage or an end passageway of 30 feet or any end passageway, or any passageway or at all, or between each of his said alleged set nets or elsewhere, or otherwise, or at all, or any other fishing appliances or any fishing appliances placed on said river, or to be placed therein; and denies that it is a crime under the laws or any law or statutes or any statute of the State of Washington or punishable under said alleged or any law for any person to construct or own or operate any appliance for the

purpose of catching fish or salmon fish or any fish, in said waters, or elsewhere, without leaving for defendant's said alleged set nets, or either thereof or each of them, or either of them an end passageway or any passageway of at least 30 feet or any distance whatever, or a lateral passage of at least 300 feet, or any distance, for that the said defendant had no right or authority to enter upon or into said premises to construct or operate said alleged set nets, or either thereof.

VIII.

This plaintiff answering unto paragraph No. 10 of said cross-bill and complaint denies that the defendant, prior to the institution of this action, expended large sums or any sum of money in acquiring the rights, or any right, of fishing or operating said alleged set nets, or each of them or either thereof, but admits that the right of fishing at that said point and in front of said Sites 2 and 3 aforesaid was of great value and profit; and denies that the or any rights acquired by the defendant therein were or was of any value whatever to defendant, [97] for that he acquired nothing; and denies that the said defendant was on June 16th, 1908, or at any time, or at all, or at all times or at any time, until enjoined by this Court, engaged in operating his said alleged set nets or either thereof or each of them for any purpose or for the purpose of catching salmon fish therein, or otherwise, or for sale in the market or otherwise, or that defendant has derived or expects to derive large or any profits from said alleged set nets or either thereof; and denies that either of said

alleged set nets is of much or of any value by reason of the salmon fish caught, or to be caught therein.

IX.

This plaintiff, answering unto paragraph No. 11 of said cross-bill and complaint, denies that, at the same place or location where defendant's alleged set nets or each of them or either thereof was located or fished or operated as alleged from the 16th of June, 1908, or at any time or until enjoined by this Court in this proceeding, said alleged locations or either or each of them was fished or operated for the purpose of catching salmon fish during the fishing season of the year 1902, or during the fishing seasons of each and every or each or every or any year or time since said year up to or including the year 1907 by the defendant's alleged, or any predecessor or predecessors in interest; and denies that defendant's alleged predecessors or any predecessors in interest of defendant fished or operated either of said locations by set nets or otherwise for the purpose of catching salmon fish or other fish with fishing appliances, or otherwise, or any appliance authorized by the laws of the State of Washington or any licenses issued by the Fish Commissioner of the State of Washington; and denies that said [98] defendant, in the manner provided by law, or otherwise, purchased said alleged or any interest in said alleged locations or either thereof; and denies that under said or any licenses issued to said defendant by the Fish Commissioner of the State of Washington defendant had located or was operating or occupying or fishing with his alleged two set nets, or either thereof for salmon fish,

or otherwise, his said alleged locations or either of them, or of his said alleged locations of his said alleged set nets, or either thereof a long time prior, or at any time prior to the time that plaintiff attempted to secure or locate thereon, or at any time whatever, or long prior or at any time prior to the time that plaintiff commenced fishing on said alleged locations or either thereof or at any other time whatever or at the time plaintiff commenced fishing operations with its drag seines. This plaintiff admits that it did not begin actual fishing operations on its said premises until about the 2d or 3d of July, 1908; and denies that it was required to secure any additional fishing location, being the owner of said premises; and denies that, under the laws or any law of the State of Washington or otherwise, defendant is or was entitled to the sole, prior, and exclusive or sole, prior or exclusive right or any right to the alleged locations, or either thereof, which were occupied by defendant's said alleged set nets, or either thereof, at the commencement of this action, or was then or is now or ever was entitled to the sole, prior and exclusive, or the sole, prior, or exclusive or any right to fish on said locations or either thereof for salmon fish or for any fish whatever, or with his said alleged or any set nets or any set net during the fishing season of this or future years of any time whatever, or at all. On the contrary plaintiff alleges that it has the exclusive right [99] to drag seines over and across the premises now occupied by the obstructions placed in front of said Sites 2 and 3 by the defendant herein which defendant calls set nets,

and the acts of said defendant in placing said buoys and anchors and the placing of said alleged set nets in front of said Sites 2 and 3 were and are the trespasses and continuing trespasses complained of in plaintiff's complaint.

X.

This plaintiff answering unto paragraph No. 12 of said cross-bill and complaint denies that, at the commencement of this action or at any time or ever since the 16th of June, 1908, or at any time whatever or at all, defendant was fishing or operating said alleged or any set nets or any set net in the usual way or in any way whatever, or in the only manner in which they or either could be fished or operated for the purpose of catching salmon fish, or otherwise or at all, or was in no way or in no manner interfering with the Sites No. 2 or 3, as alleged in plaintiff's complaint, but avers that said obstructions which defendant calls set nets are and were at the institution of this action obstructions to the navigation of said waters and absolutely prevented seining operations on said Sites 2 and 3 and each thereof. Plaintiff admits that if said alleged set nets are operated as set nets for the purpose of catching salmon fish same would be fished and operated entirely from boats on the waters of said river, providing the same were attended to at high water, but at low water the points where said obstructions are located are not susceptible to navigation; and plaintiff admits that it is not necessary to go or trespass upon the high land of said sites aforesaid, but denies that if defendant is permitted to fish or operate set nets attached

[100] to said buoys or obstructions defendant does not intend to and denies that it is not necessary to trespass or to go upon or over said Sites 2 and 3 or any part thereof; and denies that said sites or either thereof do not extend beyond low water in the waters of the Columbia River, but alleges that the same extend to and beyond the line of low-water mark and beyond the point where said obstructions are and were located; and furthermore plaintiff is entitled to the free and unobstructed ingress to and egress from said sites which said obstructions prevent and interfere with as alleged in plaintiff's complaint.

XI.

This plaintiff answering unto paragraph No. 13 of said cross-bill and complaint denies that said alleged set nets or either thereof, as located or fished by defendant, did not, and denies that if this Court permits them or either to be fished or operated, will not interfere with the navigation of said river for the purpose of trade or commerce or for any other purpose or for which the navigation of said river is used or can be used. This plaintiff denies that neither of said set nets extends to the channel of said river, but admits that the water at the place of the location of each thereof does not exceed six feet in depth at low tide, and avers that the depth of the water at said buoys at low tide does not exceed one foot.

XII.

This plaintiff answering unto paragraph No. 14 of said cross-bill and complaint denies that each or either of defendant's said alleged set nets or the obstruction complained of or the alleged exclusive

right to fish the same or otherwise or either is or were or are of the reasonable value of \$10,000.00 or any sum or amount whatever; and denies that said alleged set nets or either [101] thereof or each of them or any of them catch a great many or any valuable or any salmon fish; and denies that if defendant is permitted to fish or operate them or either, they or either would catch a great many or any valuable or any salmon fish, or amount to many thousand dollars' worth, or of any value whatever; and denies that the exact amount or value of the fish that could be caught in said alleged set nets as operated by defendant cannot be or is impossible to determine. Plaintiff admits that salmon are of great merchantable value; but denies that during the fishing seasons or either thereof of the year 1908 or at any time or future years, or at any time, defendant, if permitted to operate said alleged or either of said alleged set nets, will catch therein many valuable or any salmon fish or great or of any value or worth many thousand dollars, or any sum or amount whatever; and denies that the exact amount of salmon fish or the value of salmon fish that the defendant would catch in the said alleged set nets or either thereof cannot be estimated or computed, but avers that the same could not catch any fish whatever and were not constructed for that purpose and neither were operated for such purpose.

XIII.

This plaintiff answering unto paragraph No. 15 of said cross-bill and complaint denies that neither of said defendant's said alleged set nets or any part

thereof was at any time an obstruction to the navigation of said Columbia River, but on the contrary alleges that each was an obstruction to the navigation of said river; and denies that if defendant is permitted to operate said set nets or either thereof at the place or location where same were, at the time of the commencement of this action, the same will not constitute or be an obstruction in or to the navigation of the Columbia River or to the navigable waters of said river; and denies that no part of said buoys or either thereof [102] which mark the locations thereof or either thereof were not at any time an obstruction in or to the navigation of said Columbia River, but avers that each thereof was and is an obstruction to such navigation; and denies that neither thereof was in the navigable portions of said river, but admits that the point where each was located the water does not exceed in depth at low tide six feet and avers that at low tide the depth of the water at said point was about one foot but same constituted a portion of the channel of said river; and denies that neither thereof extended out to the channel of said river or to the part of the river used by boats or vessels plying the waters of said river for the purpose of trade or commerce.

XIV.

This plaintiff answering unto paragraph No. 16 of said cross-bill and complaint denies that neither of said set nets or any part thereof was upon any part of said Sites No. 2 and 3, or any part thereof, but avers that each were upon said two sites aforesaid; and denies that the place where said obstructions and

buoys were located were not upon said sites, but alleged that each were upon said sites; and denies that the said alleged set nets or either thereof, or the operating or the fishing of the same or either thereof did not interfere with or prevent plaintiff from ingress to or egress from said Sites No. 2 or 3 of said Sand Island, mentioned in plaintiff's complaint, but avers that each thereof did interfere with and prevent the free ingress to and egress from such sites; and denies that if defendant is permitted to operate said alleged set nets, or either thereof, at the place where same were or either was located at the commencement of this action neither will interfere with or prevent plaintiff's free ingress to or egress from Sand Island, but avers [103] that same will interfere and obstruct the free ingress to and egress from said Sites 2 and 3 as set forth and alleged in plaintiff's complaint.

XV.

This plaintiff, answering unto paragraph No. 17 of said cross-bill and complaint, denies that said defendant intends to or will fish or operate for salmon fish, or otherwise, said alleged set nets or either thereof at the same place or any place, or location where same are or either was located on or about the 16th of June, 1908, or at any time if permitted by the Court, or unless restrained by this Court upon final hearing, but avers that said obstructions were not intended as set nets but were intended simply to harass and annoy this plaintiff and prohibit plaintiff from operating seines upon the shore of said Sand Island; and denies that the said alleged set nets

or either thereof, set forth in said answer, are or were the things which the plaintiff alleges in its complaint constitute an obstruction to the navigation of said river, or are the things or thing which plaintiff in its complaint complains. But in this regard plaintiff alleges that the things complained of in its complaint were and are designated in said defendant's answer as set nets.

XVI.

This plaintiff answering unto paragraph No. 18 of said cross-bill and complaint of said defendant H. S. McGowan denies that while defendant was operating or fishing for salmon or any fish his said alleged set nets, or either thereof or each of them or any of them, at the location or place where the same were located in the waters of the Columbia River or in Pacific County or in the State of Washington, or otherwise or elsewhere, or on or about the 2d or 3d of July, 1908, or at any time or at any other [104] date or dates or time or times since said date, this plaintiff, or its agent or agents or its officer or officers or servant or servants, unlawfully or wrongfully, or otherwise or at all, or without the consent of defendant or at all, entered upon the lateral passageway or location or upon the end passageway or the location of the defendant's said alleged set nets of each of them or either thereof, or upon or over the location of said alleged set nets or each of them or either thereof, or then or there or otherwise or at all unlawfully or wrongfully or without the consent of defendant, or otherwise or at all, with any drag seine or seines, or otherwise or at all, did fish

with said or any drag seines for the purpose of catching salmon fish in said seine or seines on the location of defendant's alleged set nets or set net or each of them or either thereof, or did catch salmon fish therein which otherwise would have been caught in the said alleged set nets, or each of them or either thereof, or has ever since said time, or at all, wrongfully or unlawfully or without the consent of defendant, or otherwise, daily or at all fished for the purpose of catching salmon fish or otherwise with its said drag seine or seines upon the lateral passageway or the location or upon the end passageway or location of defendant's said alleged set nets or each of them or either thereof, or upon or over the said alleged set nets or each of them or either thereof, or is now catching salmon fish in its drag seine or seines which would otherwise be caught in defendant's alleged set nets or each of them or either thereof, or upon or over the said set nets or either of them or each thereof, or is now catching salmon fish in its drag seine or seines which would otherwise be caught in defendant's alleged set nets or each of them or either thereof were defendant permitted to operate the same or either thereof. [105]

But this plaintiff alleges that prior to the institution of this action it did enter upon its said property rights, namely said Sites 2 and 3, and did operate drag seines in front thereof and over the territory and locations claimed by the defendant herein as set net locations, and that it did so without the consent and against the protest of said defendant accordingly as plaintiff has alleged in its said complaint. This plaintiff denies, however, that thereby or otherwise

or at all the defendant is irreparably or at all damaging or injuring the defendant, or that the damages or any damage will amount to many thousands of dollars or to any sum or amount whatever; and denies that it is impossible to measure such alleged or any damage in money, or otherwise. This plaintiff admits that it is impossible to say how many fish plaintiff would or will catch in its drag seines, or how many fish it will daily catch therein before the seines are operated; but denies that it is impossible to say how many salmon fish the defendant would catch in his said alleged set nets or either thereof if permitted to operate the same, for that accordingly as the same were constructed and operated by said defendant no fish would be caught therein.

XVII.

This plaintiff answering unto paragraph No. 19 and 20 of said cross-bill and complaint admits that it will continue, during the fishing seasons on the Columbia River, to daily fish for salmon fish and in front of said Sites 2 and 3 and over the territory claimed by the defendant as his set net locations so long as it has the right so to do from the owner of said Sand Island, namely the United States; but denies that said defendant has any set net location or right to have any set net location, or has any lateral passageway or end passageway to any set net location, or that [106] the defendant ever operated a set net thereon; and admits that this plaintiff claims the exclusive right to draw seines on and over the frontage to said Sites 2 and 3 on Sand Island; and denies that the defendant has any right to construct

or operate any fixed appliance or stationary obstruction in front thereof, but accedes the right in the defendant or in the public to use floating appliances for the purpose of catching salmon fish in any of the waters of said river; but denies that in the operation of said drag seines plaintiff has trespassed upon any right of the defendant; admits that this plaintiff will prevent the defendant, in so far as it can, without violating the law, from placing stationary appliances or structures or any fixtures in front of said Sites 2 and 3 that will, in any manner, prevent or interfere with the free ingress to and egress therefrom, or from the operation of drag seines in front thereof; but denies that the said defendant will thereby, or otherwise, be irreparably or at all damaged or that the damage to the defendant or any damage to defendant will amount to many thousands of dollars or any sum or amount, and denies that it is impossible to measure such alleged damage or damages; denies that it is impossible to ascertain how many fish defendant would catch in his said alleged set nets during the fishing season of this year or at any time, for that the same will not catch any fish accordingly as operated by defendant.

XVIII.

This plaintiff answering unto paragraph No. 21 of said cross-bill and complaint of said defendant H. S. McGowan, says that it is true and admits that on the 3d day of July, 1908, plaintiff endeavored to prevent and is now endeavoring to prevent defendant from operating his said alleged set nets where the same are located in front of said Sites 2 and 3,

and where the same [107] interfere with and obstruct the free ingress to and egress therefrom. This plaintiff denies that it claims the exclusive right of fishery in the Columbia River, but claims it has the exclusive right to operate drag seines in front of said Sites 2 and 3 and that no one has the right to prevent plaintiff from so doing by any obstruction placed in said waters in front thereof; and that plaintiff has, at all times, denied that defendant has any right to place in said waters in front of said sites at the place where defendant constructed the same the alleged set nets, described in said cross-bill and complaint.

XIX.

This plaintiff answering unto paragraph No. 22 of said cross-bill and complaint says that it is true and admits that it will, unless restrained by this Court, continue daily during the salmon fishing season only, to fish and operate its said drag seines upon and in front of said Sites 2 and 3 accordingly as alleged in its said complaint; but denies that the operation of the same will be upon the lateral location or end passageway of any set nets owned by defendant. This plaintiff also admits that it denies that defendant has any right to construct or operate any fixed appliance in front of said sites.

XX.

This plaintiff answering unto paragraph No. 21½ of said cross-bill and complaint denies that because said defendant has been enjoined in this suit or prevented from fishing for the purpose of catching salmon fish, or otherwise, each or all or any of his

said alleged set nets at the location or locations in said cross-bill and complaint mentioned, has been damaged in the sum of many thousand dollars or in any sum or amount or damaged at all; [108] denies that it is impossible to allege or state specifically the exact amount of money in which said defendant has been damaged; and denies that defendant has been damaged in any sum or amount; or that he has been damaged in the sum of at least \$20,000.00 or in any sum or amount up to the present time, or at all; and denies that defendant has been damaged in any sum or amount whatever.

XXI.

This plaintiff answering unto paragraphs No. 23 and 24 of said cross-bill and complaint denies that defendant does not have a plain, speedy, or adequate remedy at law for the redress of the alleged grievances, or at all; and denies that an emergency exists; and denies that defendant is entitled to a permanent or any injunction forever or at all enjoining plaintiff from maintaining or operating said seines or any or either of them on the alleged lateral location or alleged end passageway of any of defendant's alleged set nets, or from interfering with defendant's right to fish or operate defendant's said alleged set nets, or either thereof.

XXII.

This plaintiff further answering unto the said cross-bill and complaint of defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said alleged cross-bill and complaint charged; without this there is no other mat-

ter, cause, or thing in said defendant's cross-bill and complaint contained, material, or necessary for this plaintiff to make answer to, and not herein and hereby well and sufficiently answered to, and confessed, traversed, and avoided or denied is true to the knowledge or belief of this plaintiff all of which matters and things this plaintiff is ready and [109] willing to aver, maintain, and prove as this honorable Court shall direct; and humbly prays to be hence dismissed as to the pretended cross-bill and complaint of this defendant, with its reasonable costs and charges in its behalf most wrongfully sustained; and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity.

G. C. FULTON,

Solicitor for Complainant. [110]

State of Oregon,

County of Clatsop,—ss.

I, Samuel Elmore, being first duly sworn, depose and say: That I am vice-president of complainant in the above-entitled action; and that the foregoing answer is true, as I verily believe.

[Seal]

SAMUEL ELMORE.

Subscribed and sworn to before me this 26th day of October, 1908.

G. C. FULTON,

Notary Public for Oregon.

State of Oregon,

County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn on oath depose and say: That on October 27, 1908, I delivered to

Messrs. Welsh, Welsh and O'Phelan, attorneys for the defendants herein, a true, full and correct copy of the foregoing answer by depositing the same in the United States postoffice at Astoria, Oregon, inclosed in a sealed envelope, postage prepaid, addressed to said attorneys at South Bend, Washington.

[Seal]

G. C. FULTON.

Subscribed and sworn to before me this 29th day of October, 1908.

W. M. VAN DUSEN,
Notary Public for Oregon.

Filed U. S. Circuit Court, Western District of Washington. Oct. 30, 1908. A. Reeves Ayres, Clerk. ————, Deputy. [111]

[Replication of H. S. McGowan to Answer to Crossbill and Complaint.]

In the Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P. COYLE, WALTER BUSSEY and L. N. STENSLAND,

Defendants.

H. S. MCGOWAN'S REPLICATION TO THE
ANSWER WHICH THE PLAINTIFF HAS
FILED TO THE CROSS-BILL AND COM-
PLAINT OF H. S. MCGOWAN.

To replication of H. S. McGowan to the answer which plaintiff has filed to the cross-bill and complaint of H. S. McGowan.

This replicant, H. S. McGowan, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the Columbia River Packers' Association, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said Columbia River Packers' Association, and that the answer of the said Columbia River Packers' Association is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove, as this honorable Court shall direct and humbly prays as in and by his said cross-bill he hath already prayed.

WELSH, WELSH & O'PHELAN,
Solicitors for Defendant, H. S. McGowan. [112]

State of Washington,
County of Pacific,—ss.

I, H. S. McGowan, being first duly sworn, upon my oath do depose and say: That I am one of the defendants in the above-entitled action, and one of the cross-complainants therein. That I have read the above and foregoing replication and know the contents thereof, and that the same and the whole thereof is true as I verily believe.

H. S. McGOWAN.

Subscribed and sworn to before me this 18th day of December, A. D. 1908.

[Notarial Seal]

GEO. HIBBERT,

Notary Public for the State of Washington, Residing
at Chinook, in Said State. [113]

*In the Circuit Court of the United States for the
Western District of Washington, Western Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and L. N.
STENSLAND,

Defendants.

AFFIDAVIT.

State of Washington,
County of Pacific,—ss.

I, John T. Welsh, being first duly sworn upon my oath depose and say: That I am one of the attorneys

and solicitors for the defendant and cross-complainant H. S. McGowan in the above-entitled action.

That my place of residence and address is South Bend, Pacific County, Washington.

That G. C. Fulton is the attorney of record for the Columbia River Packers' Association, the plaintiff in the above-entitled action, and the place of residence and address and the office of said G. C. Fulton is Astoria, Clatsop County, State of Oregon.

That on the 24th day of December, A. D. 1908, I put in an envelope a true and correct copy of the foregoing attached replication in the above-entitled action and proceeding and then I sealed said envelope and prepaid the United States postage thereon in advance and then I wrote the following name and address on said envelope, namely: G. C. Fulton, Attorney at Law, Astoria, Clatsop County, Oregon, and then on said 24th [114] day of December, 1908, I deposited said envelope and its contents in the United States postoffice at South Bend, Washington.

That there is a daily communication of the United States mails to, from and between said South Bend, Washington, and said Astoria, Oregon, and that there is a United States postoffice at each of said places.

JOHN T. WELSH.

Subscribed and sworn to before me this 24 day of December, A. D. 1908.

[Notarial Seal]

SOL. SMITH,

Notary Public for the State of Washington, Residing at South Bend in Said State.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Dec. 26, 1908. A. Reeves Ayres, Clerk. —————, Deputy. [115]

[Stipulation for Omission from Transcript on Appeal of Original Bill, Pleadings of Defendants Lindstrom and Coyle, etc.]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Complainant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

IT IS HEREBY stipulated and agreed by and between the respective parties in the above-entitled cause that for the purpose of shortening the transcript on appeal, the pleadings filed in this cause on behalf of defendants, Erick Lindstrom and J. P. Coyle, and the pleadings of the plaintiff directed against the same, may be omitted for the reason that said pleadings are, in all respects, identical with the pleadings filed herein on behalf of defendant H. S. McGowan and with those filed by plaintiff directed against the pleadings of H. S. McGowan, save and except only that the approximate descriptions, loca-

tions and license numbers of defendants Lindstrom and Coyle are separately referred to and described in their said pleadings, said set net locations of defendant Lindstrom being numbered 1433, 1434 and 1435; and those of defendant Coyle being numbered 1436, 1437 and 1438, and located in the Columbia River off the southerly side of Sand Island below the line of ordinary low tide and above or to the northward of the Government's fairway or channel line whereat it is claimed by defendants fishing may be carried on with fixed appliances without special Government permits. [116]

Said fishery locations are further described as lying immediately to the southward below and in front of the low tide line which as claimed by defendants is the south boundary line of Government Sites numbered 2 and 3 lying along the shore of said Sand Island.

And for the purposes and uses of said record, the pleadings of defendant H. S. McGowan and the pleadings of plaintiff directed against the same shall be deemed also to be the pleadings of defendants Lindstrom and Coyle and the pleadings of the plaintiff directed against the same, subject only to variations as to license numbers and descriptions, as aforesaid.

IT IS FURTHER stipulated that the original bill in equity may be omitted from the transcript for the reason that an amended bill was filed.

Dated this 3d day of December, A. D. 1913.

G. C. FULTON,

Attorney for Plaintiff.

WELSH & WELSH,

DORR & HADLEY,

Attorneys for Defendants.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [117]

**[Petition of Plaintiff That Suit be Dismissed
Without Prejudice.]**

*In the Circuit Court of the United States for the
Western District of Washington, Western Divi-
sion.*

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

To the Honorable, the Circuit Court of the United
States for the Western District of Washington,
Western Division:

Comes now the above-named plaintiff, the Colum-
bia River Packers' Association, and respectfully rep-

resents and shows to this honorable Court as follows, that is to say:

That your petitioner instituted the above-entitled suit in the above-entitled court for the purpose of securing an injunction enjoining and restraining the defendants from trespassing upon the proprietary rights of the petitioner on, in and to and depriving him of the use and enjoyment of that certain tract of land and real property situated on the south shore of Sand Island (for a more particular description of said lands and property rights, reference is hereby made to the amended complaint filed herein), an island in the Columbia River, near its mouth, and lying south of the north ship channel of said river.

That said Sand Island is the same tract of land and the same Sand Island that is described and mentioned in the opinion of the Supreme Court of the United States in the suit hereinafter mentioned wherein the State of Washington was claimant and the State of Oregon was defendant.

That your petitioner instituted this suit in perfect good faith.

That, at and long prior to the institution of this suit, the officials of the State of Washington, both executive, [118] judicial, and legislative contended that said Sand Island was wholly within the *the* territorial limits and jurisdiction of the State of Washington, and denied that the State of Oregon, or its officers, executive, judicial, or legislative, had or could exercise any jurisdiction thereover and contended that the south boundary line of the State of Washington was the middle of the channel of the

Columbia River located immediately south of said Sand Island.

That said claims of exclusive jurisdiction over said island had been asserted as aforesaid and acted upon and sustained by the officials and courts of the State of Washington for many years prior to and were being so asserted and sustained at the time of this suit.

That pursuant to said claim the citizens of said State of Washington, and the officials thereof, at all times prior to the decision of the Supreme Court of the United States herein mentioned, had taken possession of and exercised exclusive dominion over all the fisheries and fishing rights pertaining to said Sand Island, and over all the water north of the south channel of the Columbia River, and asserted and assumed to exercise exclusive jurisdiction thereover.

That by reason of the acts and claims of said State of Washington and its officials and citizens your petitioner was advised and was led to believe that said Sand Island was within the territorial boundaries and jurisdiction of the State of Washington, and by reason thereof it instituted this suit in the above-entitled Court expecting and intending to maintain the same and prosecute it to final determination.

That since the institution of the above-entitled suit by consideration of the Supreme Court of the United States [119] duly rendered and entered on the 16th day of November, 1908, in the said cause wherein the State of Washington was claimant and the State of Oregon was defendant, it was held and judicially determined by said Supreme Court of the United States, that the boundary line between the

State of Washington and the State of Oregon is and at all times has been the north ship channel of the Columbia River and is located north of said Sand Island; and that said Sand Island is and at all times has been within the territorial limits and is a part of the territory of the State of Oregon.

Your petitioner therefore respectfully suggests that this Court has not the jurisdiction over the subject matter of this suit and by reason thereof your petitioner respectfully prays that this suit be dismissed, without prejudice.

THE COLUMBIA RIVER PACKERS'
ASSOCIATION,

Petitioner.

By C. W. FULTON,

Of Its Attorneys.

C. W. & G. C. FULTON,

Attorneys for Petitioner. [120]

*United States Circuit Court, Western District of
Washington, Western Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIA-
TION,

Plaintiff,

vs.

H. S. MCGOWAN et al.,

Defendants.

Filed _____

Opinion on Plaintiff's Motion to Dismiss for Want of Jurisdiction.

C. W. & G. C. FULTON, for Plaintiff.

WELSH, WELSH & O'PHELAN, for Defendants.

W. P. BELL, Attorney General of the State of Washington, Amicus Curiae.

DONWORTH, District Judge:

This is a suit in equity begun originally in this court in July, 1908. The plaintiff is a corporation organized under the laws of the State of Oregon and the defendants are citizens and residents of the State of Washington. The object of the suit is to obtain an injunction restraining the defendants from placing in any of the waters of the Columbia River in front of or adjacent to certain premises described as Sites Nos. 2 and 3 on Sand Island, and from maintaining in front of said premises in said waters any obstruction whatever, particularly certain obstructions alleged in the complaint to be there maintained by the defendants, and from interfering with the free and uninterrupted ingress to and egress from said premises. There is also a prayer that all obstruction placed in said waters in front of said premises be abated, and that the defendants be required to remove the same and for general relief. The amended complaint filed August 11, 1908, alleges that the United States is the owner of "that certain tract of land situated and located, within the County of Pacific in the State of Washington, the [121] same being an island in the Columbia River near the mouth of said River, which was and is generally

known and named upon all official records, maps and plats as Sand Island," and that pursuant to an act of Congress granting authority to the Secretary of War for that purpose, the plaintiff holds a valid lease for those certain portions of Sand Island designated on the maps and plats of the Government survey, as Sites Nos. 2 and 3, for the term of three years from May 1, 1908, "together with the tide lands water rights, fishing rights, and riparian rights adjacent thereto to the navigable channel of said Columbia River." It is further alleged that "said Sites 2 and 3 aforesaid, are on the south side of said Sand Island and are on the north shore of the main ship channel of the Columbia River, and within the jurisdiction of this Court, and within the Western District and Western Division thereof." It is also averred that "under the laws of the United States the said waters are required to be kept free from obstructions and that by virtue of said laws, and said lease aforesaid, plaintiff is entitled of right to have said waters and said channel of said river free and unobstructed, and is entitled of right to the free, unobstructed ingress to and egress from said premises, and is entitled of right to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores." The acts of the defendants constituting the alleged interference with plaintiff's rights are set forth in the amended complaint as follows:

"That in order to operate seines in front of said Sites 2 and 3 it is necessary that the waters

and channel of said river be free and unobstructed, for that it is necessary to lay each seine out into the waters of said river a distance of two or three hundred fathoms, each seine being about that long, and to permit the same to drift with the tide and current and then to haul the same in on the shore. That plaintiff was proceeding to so operate its said seines, under its licenses aforesaid and [122] under the same lease aforesaid, when the *the* defendants herein wrongfully and unlawfully and in violation of plaintiff's rights and in violation of the laws of the United States which prohibits the placing of any obstructions in the navigable waters of said river, and without the consent of plaintiff, but against plaintiff's consent, placed in the channel of said navigable waters of said Columbia River directly in front of plaintiff's leased premises and in front of said Sites 2 and 3 aforesaid, certain obstructions to the navigation of said waters consisting of *large to* which were attached wire cables and chains and large timbers for a float or buoy. That said obstructions were seven in number and were placed in the waters of said river about fifty to one hundred feet from the shore and about two or three hundred feet apart. That said stones and anchors, or weights, were large and of great weight and were so placed that plaintiff could not operate its seines in the waters of said river and could not land its seines or either thereof on the shores of said leased premises and absolutely prevented plaintiff from

operating seines on said lands and excluded the public generally from operating either gill nets, drift nets, or seines in the waters of said river.

That plaintiff thereafter and on the 2d day of July, 1908, at great labor and expense and time, removed all of said obstructions and was proceeding to operate its seines in said waters in front of said premises and land the same on the shores thereof when the said defendants, again on the 4th day of July, 1908, wrongfully and unlawfully and in violation of the laws of the United States aforesaid and against plaintiff's consent, placed six more of said obstructions in front of said premises aforesaid in practically the same position as those plaintiff removed, that is to say that each of said obstructions consisted of a large stone or stones of great weight to which were attached wire cables and chains, and the same were placed on the bed of the river and the float or buoy of large timbers were attached at the end of said cables; and that said obstructions were placed from fifty to one hundred feet from the shore of said Sites 2 and 3 and from two to three hundred feet apart and in such a position as to absolutely prevent plaintiff from operating its said seines and to prevent plaintiff from landing its seines or any seine on said shore.

That said obstructions are in the navigable waters of said river and are so placed as to prevent the free ingress to and egress from said

premises and interferes with and prevents free access to said premises.

That the defendants threaten to and will, unless restrained by this Court, continue to place other of said obstructions in said waters in front of said premises; and threaten to continue to use and employ the same and will do so unless restrained by this Court. That said obstructions so placed and those threatened to be placed are not placed for the purpose of trade or commerce or for any practical use, but are placed there for the purpose of harassing and annoying plaintiff and preventing plaintiff from operating its seines and interfering with and obstructing the free ingress to and egress from said premises, and none are placed there in good faith and each is an obstruction to the navigation of said river.

* * * [123]

* * * That the said trespass herein complained is continuous and the defendants will, unless restrained, continue daily to place said obstructions and other obstructions to the operation of plaintiff's seines, and will daily continue to exercise the exclusive right of fishery in front of said premises and will continue to harass and annoy plaintiff and prevent plaintiff from ingress to and egress from said premises."

On the filing of the complaint the Court fixed a time for hearing the application for an injunction pending the suit and at the same time issued a restraining order restraining the defendants "from in any manner interfering with the free ingress to

and egress from, and from placing and maintaining any obstruction or anchor or killock, or any timber, log, or appliance that will interfere with the use of a seine floating upon and navigating the waters of the Columbia River in front of or adjacent to Sites Nos. 2 and 3 on Sand Island." This order has not been dissolved. At the time of its issuance plaintiff was required to file an injunction bond in the penal sum of two thousand dollars.

Thereafter the defendants appeared and filed separate answers wherein, after denying and admitting certain of the allegations of the amended complaint, extensive affirmative matter is set forth. Briefly stated, the allegations of the defendants are to the effect that their acts in the premises were and are *bona fide* operations for the purpose of catching salmon fish by means of set nets under licenses issued by the Fish Commissioner of the State of Washington; that the objects maintained by them in the river in front of Sand Island were below the line of extreme low tide and were put and kept there for the purpose of operating said set nets and marking and holding the location thereof; that each set net was located by a stone anchor weighing about three hundred pounds, to which was attached a piece of chain about five feet long clamped to a wire rope about 25 feet long, and that to this was attached a cedar buoy about 4 feet long and [124] 8 inches square, upon which buoy was securely fastened the license number of each location. The affirmative portions of the answers set forth with a good deal of detail the facts upon which the defendants base their claim of the

right to maintain and operate nets and to prosecute the business of salmon fishing in this location. They further allege wrongful acts in the premises on the part of the plaintiff and pray affirmatively for relief by way of injunction for the purpose of preventing any interference by the plaintiff with their set nets, and necessary appliances. There are allegations of diverse citizenship and other allegations showing the purpose of the defendants to set forth a complete cause of action on their part against the plaintiff.

At the time of the commencement of the suit and the issuance of the restraining order and also at the time of the filing of the amended complaint and of the answers, both parties assumed and believed that the boundary between the States of Oregon and Washington was in the middle of the main ship channel of the Columbia River south of Sand Island, thus placing the island, and its shores, and the waters involved in this controversy wholly within the State of Washington. The location of the interstate boundary was at that time in litigation in a suit begun in the Supreme Court on February 26, 1906, by the State of Washington against the State of Oregon. That suit was decided by an opinion delivered May 24, 1909. *Washington vs. Oregon*, 213 U. S. ——. Since the final decision of the Supreme Court, the plaintiff has moved this Court to dismiss the pending suit for want of jurisdiction on the ground that the suit is a local one and concerns real estate and property situated in the State of Oregon and therefore not within the Western District of [125] Washington. The motion is registered by the defendants.

The question of jurisdiction has been fully argued and is now to be decided.

In view of the decision of the Supreme Court in the boundary suit between the two States, I must hold that Sand Island and the shores and waters constituting the place involved in this controversy, are south of the boundary line and lie within the State of Oregon. Counsel for defendants have urged with much vigor that the present Sand Island is not the same island as the one described by that name in the opinion of the Supreme Court. They assert that the Old Sand Island entirely disappeared several years ago and that the present island, bearing the same name, formed later by the action of the tides and currents, is north of the line which the Supreme Court has fixed as the boundary. They ask a reference to a Master for the purpose of ascertaining the facts in this regard. The answer to this contention is that the Supreme Court has clearly decided that the boundary is the channel north of the present Sand Island. In the opinion on petition for rehearing it is said: "There are practically two matters presented; one whether the boundary near the mouth of the Columbia River was and is the channel north of Sand Island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons, therefore." *Wash. vs. Ore.*, 213 U. S. ——. There is no doubt whatever that this decision fixes the boundary north of the Sand Island that now exists, and I so hold.

This brings us to the further inquiry whether this Court has jurisdiction to hear and determine this

cause and to enforce its decree therein by virtue of the legislation of Congress relating to concurrent jurisdiction on the Columbia River. [126] In *Nielsen vs. Oregon*, 212 U. S. 215, 316, that legislation is briefly summarized as follows:

“By par. 1 of the act of Congress of March 2, 1853, c. 90, 10 Stat. 172, all that part of the Territory of Oregon lying north of the ‘main channel of the Columbia River’ was organized into the Territory of Washington, and by par. 21 of the same act it is provided ‘that the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms the common boundary between said territories.’ Section 1 of the act of Congress admitting Oregon into the Union (act of February 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the State, provides, ‘including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State.’ And in par. 2 it is said ‘the State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same.’”

The constitution of the State of Washington defines the State boundaries and makes no mention of

concurrent jurisdiction on the Columbia River, but, as will be shown later, the State has not lost such jurisdiction by reason of its failure to assert it by positive enactment. The territorial jurisdiction of this Court is defined in the act dividing Washington into two judicial districts. That act provides that certain counties lying east of the Cascade Mountains, with the waters thereof, shall be detached from the judicial district of Washington, and "that the residue of said State of Washington with the waters thereof, shall hereafter be the Western District of Washington." 33 U. S. Stat. pt. 1, 824. This language is ample to vest in this Court as broad a jurisdiction over that part of the Columbia River involved in this controversy as any State court might exercise, and is *to read* in connection with the former legislation of Congress above mentioned.

In *Nielsen vs. Oregon*, *supra*, it is said: [127]

"By the legislation of Congress the Columbia River is made the common boundary between Oregon and Washington, and to each of those States is given concurrent jurisdiction on the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either State, is not in terms prescribed. It is true in the first section of the act admitting Oregon the jurisdiction was apparently limited to 'civil and criminal cases,' but in the second section of that act there was given in general terms 'concurrent jurisdiction.' In *Wedding vs. Meyler*, 192 U. S. 573, 584, construing the term 'concurrent jurisdiction,' as

given to Kentucky and Indiana over the Ohio River, this Court, reversing the Court of Appeals of Kentucky, said:

“Concurrent jurisdiction, properly so called, on rivers is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See *Sanders vs. St. Louis & New Orleans Anchor Line*, 97 Missouri, 26, 30; *Opsahl vs. Judd*, 30 Minnesota, 126, 129, 130; *J. S. Keator Lumber Company vs. St. Croix Boom Corp.*, 72 Wisconsin, 62, and the cases last cited.

“The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words “meant only that the States should have legislative jurisdiction.” But jurisdiction, whatever else or more it may mean, is jurisdiction in its popular sense of authority to apply the law to the acts of men. *Vicat Vocab.*, sub. v. See *Rhode Island vs. Massachusetts*, 12 Pet. 657, 718. What the Virginia compact most certainly conferred on the States north of the Ohio was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. *State vs. Mullen*, 25 Iowa, 199, 205, 206.’

Undoubtedly, one purpose, perhaps the primary purpose in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted

was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. * * * But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the States.”

In *State vs. Mullen*, 35 Iowa, 199, the Court sustained the conviction in Iowa of a person charged with maintaining a nuisance on a boat in the Mississippi River, although the boat was, for a portion of the time, resting on the soil of an island near to the Illinois shore, and within the territorial limits of Illinois. The rights of concurrent jurisdiction on the Mississippi River were substantially the same as on the Columbia. [128]

The Court said:

“If this boat is so upon the river that the person maintaining it there is amenable to the laws of this State, and our courts have jurisdiction to try and punish him for keeping a nuisance, it is a logical sequence that this jurisdiction must draw after it every thing necessary to make it effective and complete. We must either concede the right to abate the nuisance, or deny the right to try and punish the defendant for maintaining it.

A denial of the ‘drop of blood’ is equally a denial of the ‘pound of flesh.’ It is claimed that to allow the officers of the State to seize this boat *would* an invasion of the sovereignty of

the State of Illinois. If the defendant may be tried by the courts of this State for an act done upon the boat, it must follow that the officers of this State may arrest him upon the boat for the purpose of bringing him before the Court for trial. It would be inconsistent to say that the locus of a crime is within the jurisdiction of a court for the trial of an offense, and yet beyond it for the arrest of the offender. If the officers of this State may lawfully go upon the boat for the arrest of the defendant, why may they not lawfully do so for the seizure of the boat itself? If one is not an invasion of the sovereignty of the State of Illionis, why is the other?"

As above shown, this case is cited with approval in *Wedding vs. Meyler*, 192 U. S. 573, 585. In the *Annie M. Smull*, 2 Sawyer, 226 (Fed. Cas. No. 423), which is perhaps an extreme case, District Judge Deady sustained the jurisdiction in admiralty of the District Court of Oregon over a vessel moored at a wharf at Kalama on the Washington shore. See, also, in addition to cases cited above, *Memphis Packet Co. vs. Pikey*, 142 Ind. 304 (40 N. E. 527), and *State vs. Faudre*, 46 S. E. 269. Nor was it necessary that the State of Washington should by its constitution or otherwise assert its concurrent jurisdiction by expressly accepting the congressional enactments. "It must be remembered that this was legislation, and when it is enacted by the sovereign power that new States, when formed by that power, shall have a certain jurisdiction, those States as they come into existence fall within the range of the en-

actment and have the jurisdiction." *Wedding vs. Meyler*, 192 U. S. 573, 583.

It is of course clear, as held in the case last cited, [129] that the concurrent jurisdiction given is jurisdiction "on" the river and does not extend to permanent structures attached to the river bed and within the boundary of the other State. Plaintiff's counsel urge that the present case does not involve things "on" the river and contend that the cases of *Gilbert vs. Moline Water Power Co.*, 19 Iowa, 319, and *M. & M. Railroad Co. vs. Ward*, 67 U. S. 485, are controlling. To me, however, it seems clear that the parties in this case are here contending about things "on" the river. I have set forth with some fullness their respective allegations and claims and do not consider any extended reasoning necessary to demonstrate that the subject matter of the litigation is within both the letter and the spirit of the congressional enactments. The only objects involved which by any possible theory could be considered permanent structures are the stone anchors, and I cannot assume that the stones at the bottom of the river are the only or even the principal things concerned in the controversy. If it should be held that the mere fact of anchoring a floating object takes it out of the grant of concurrent jurisdiction, there would be little left of that jurisdiction. It is not necessary, in order to uphold the jurisdiction, that the Court have power to administer all of the relief asked; it is sufficient if the facts alleged show a substantial controversy between the parties within the jurisdiction of the Court. It is also urged that the case of *Roberts vs. Fullerton*,

117 Wis. 222 (93 N. W. 1111), is in point and is opposed to the views above stated. The question there involved, however, was chiefly legislative rather than judicial jurisdiction, and were it not so, I should in any event, feel bound by the decisions of the Supreme Court, to sustain the jurisdiction of this Court in the present case. Many nice questions must arise from conflicting State legislation [130] in these cases and I express no opinion at this time as to what law defines the rights of the parties at the place in controversy. But as between courts of concurrent jurisdiction the court that first acquires jurisdiction holds it to the exclusion of all others. The question as to what law will be the rule of decision between the parties relates to the merits and not to the jurisdiction.

If at the time of the commencement of this action the Court possessed the definite knowledge of the actual location of the State boundary which it now has, it is perhaps probable that the exercise of judicial discretion and with due regard for the comity of courts, the restraining order and injunction applied for would have been refused, leaving the plaintiff to seek a remedy in the courts sitting in the State of Oregon. But a different situation is now to be met. By reason of the action of the plaintiff in beginning suit in this court and obtaining the restraining order, the defendants have been prevented for an entire year from making any use of such nets and appliances as they may have had or may have purposed to have on the premises. If it should develop that they are in the right of the controversy (which is obviously a thing that cannot be known at this time) they

should not be deprived of such remedy as they may have under the injunction bond, or otherwise, for yielding obedience to the orders of a court which, under the legislation of Congress, was a court of competent jurisdiction.

Numerous reasons may be assigned for the action of Congress in granting concurrent jurisdiction to new States bounded by the great rivers; and though there are obvious difficulties, the conveniences far outweigh the disadvantages. The circumstances of the present case vindicate the wisdom of the [131] enactment. Valuable rights being in controversy in a situation near to the boundary line between the two States, and there being no process other than the writ of injunction that would prevent the use of force in the assertion of the divers claims, this suit was brought in this court on the assumption that the location was within its jurisdictional limits. In my opinion, the grant of concurrent jurisdiction sustains the right of this Court to hear and determine the controversy and to enforce its decree, regardless of the fact that by judicial determination the actual boundary is now found to be so situated as to place the location of the controversy in the other State. To decline to retain jurisdiction of this suit would be to refuse to apply the congressional enactment to a case peculiarly within the reason for its existence.

The motion to dismiss is denied.

GEORGE DONWORTH,

Judge.

Filed U. S. Circuit Court, Western District of Washington. Sep. 10, 1909. A. Reeves Ayres, Clerk. ———, Deputy. [132]

In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 1385-C.

COLUMBIA RIVER PACKERS' ASSOCIATION,
a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, J. P. COYLE and ERICK LINDSTROM,

Defendants.

Order Denying Petition of Plaintiff to Dismiss.

The above-entitled cause having been heretofore argued and submitted to the Court upon the petition and motion of the plaintiff to dismiss this action for want of jurisdiction in this Court to try the case, and the Court, not being fully advised in the premises at the time said argument was made, took the same under advisement until this day.

Now, on this day, the Court being fully advised, it is ORDERED that said motion be and the same is hereby overruled and denied.

It appearing to the Court that this order was made on the 10th day of September, 1911, but through a mistake and oversight, the same was not entered of record that date.

It is ORDERED and ADJUDGED by the Court that this order be and the same is hereby entered as of such date.

EDWARD E. CUSHMAN,
Judge of U. S. District Court, for Western District
of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Jan. 31, 1914. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [133]

*In the Circuit Court of the United States, Western
District of Washington, Western Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN et al.,

Defendants.

**Order Allowing Filing of Supplemental Bill of
Complaint, etc.**

Now on this date, coming on to be heard the
above-entitled suit upon stipulation filed herein
signed by the attorneys for the respective parties
granting the plaintiff the right to file its proposed
supplemental bill of complaint, and granting the
answering defendants the privilege of filing an
amended or supplemental answer and an amended
or supplemental cross-bill or either or all, by either
or all of the defendants: the plaintiff appearing by

Honorable G. C. Fulton, and the defendants by Messrs. Dorr & Hadley, and Messrs. Welsh & Welsh, and based upon said stipulation.

IT IS ORDERED that said plaintiff be and is hereby allowed to file its supplemental bill of complaint heretofore offered and that the defendants shall have thirty (30) days from October 17th, 1910, in which to plead thereto.

IT IS FURTHER ORDERED that the answering defendants or any of them are hereby allowed to file an amended or supplemental answer and are also allowed to file a supplemental or amended cross-bill or either or both.

IT IS FURTHER ORDERED that the time in which the said defendants shall file such amended or supplemental pleadings [134] is thirty days from October 17th, 1910, and plaintiff shall have thirty days after service of any such amended or supplemental pleading in which to plead thereto.

GEORGE DONWORTH,

Judge, Circuit Court.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Oct. 19, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. [135]

*In the Circuit Court of the United States for the
Western District of Washington, Western Di-
vision.*

IN EQUITY.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

Supplemental Bill of Complaint.

To the Honorable Judges of the Above-entitled
Court:

The above-named complainant by this its supplemental bill of complaint filed herein by leave of Court first had and obtained alleges:

I.

That on or before the — day of July, 1908, your orator exhibited his original bill of complaint in this honorable Court against H. S. McGowan, Erick Lindstrom, J. P. Coyle, Walter Bussey, and I. N. Stensland, defendants herein, as defendants thereto thereby stating that the plaintiff is a corporation duly organized and existing under and pursuant to the laws of the State of Oregon and duly licensed and empowered as such to transact business in the State of Washington in accordance with the laws of said State; and further stating that defendants are citizens of the State of Washington and of the Western

District thereof and of the Western Division thereof; and further stating that long prior to the institution of said suit and the grievances therein complained of the United States of America was and still is the owner in fee of that certain island situated near the mouth of the Columbia River which was and is generally known and named upon all the official records, [136] maps, and plats as Sand Island, together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; and further stating that said Sand Island was by proclamation of the President of the United States duly issued and published on the 29th day of August, 1863, reserved from sale for military purposes and for military reservations, and the same is and ever since has been held and reserved as such by the United States; and further stating that said Sand Island was situated and located within the County of Pacific in the State of Washington; and further stating that pursuant to an act of Congress approved July 23, 1892 (27 Stat. 321) granting authority to the Secretary of War to lease for a period not to exceed five years such property of the United States under his control as should not for the time be required for public use duly and in the manner required and provided by law on the first day of May, 1908, duly leased to plaintiff Sites No. 2 and 3 on said Sand Island for the term of three years from said date, together with the tide lands, water rights, riparian rights, and fishing rights adjacent thereto; and further stating that the portion of said island so leased aforesaid, and being Sites No. 2 and

3 was and is all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north of a line drawn at the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark due west of the United States Monument No. 4 erected on said island by the United States Government surveyors, and so marked, thence easterly along the said shore line to the east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that would intersect a north and south line 781 [137] feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked; and further stating that upon the execution and delivery of said lease the plaintiff immediately entered into the possession of said premises and the whole thereof, and the said premises described in said lease, namely the said Sites No. 2 and 3 above the line of low-water mark, consist of a sandy beach up to the line of high water and then it is composed entirely of sand, practically no vegetable grows thereon and the same is not susceptible to cultivation or agricultural uses and contains no mineral or phosphates of any kind. That the bed of said river below low-water mark is quite level with a hard sandy bottom with quite a gradual slope for a short distance into deep waters. That said Sites No. 2 and 3 aforesaid are on the south side of said Sand Island and further stating that the same are on the north shore of the main ships' channel of

the Columbia River and within the jurisdiction of this Court and of the Western District and of the Western Division thereof, and the same were and are of great value as and for the right to draw seines thereon and thereover and in the waters in front thereof, and were leased to plaintiff for such purposes; and further stating that plaintiff was duly licensed to operate three seines on said island; and further stating that plaintiff made all preparations necessary to do so and in order to operate the same it was necessary that no obstructions should be placed in the waters of said river in front of said premises; and further stating that plaintiff was preparing to operate seines in the waters in front thereof and to haul the same on the shore of said Sites 2 and 3 when the said defendants wrongfully and unlawfully and against its consent and without right placed divers and sundry obstructions in front of said [138] premises so that the plaintiff was unable to operate its said seines and threatened to *maintained* such obstructions and would so maintain the same unless restrained by this Court; and further stating that said premises are and at all times have been of great value for the right of fishery thereon and the right to haul and land seines thereon and in front thereof and to operate seines from the shore into the waters of the Columbia River and to haul the same on the shore thereof for the purpose of catching salmon fish during the salmon fishing season of each year on said river; and stating that under the laws of the United States the said waters are required to be kept free from all obstructions

and that said obstructions were not placed therein by virtue of any authority from the United States or any official thereof or department thereof.

II.

Your orator further shows that said defendants, H. S. McGowan, Erick Lindstrom, and J. P. Coyle, being duly served with process of subpoenas, appeared to your orator's said bill and put in their separate answers thereto, whereby each alleged and admitted that said Sand Island and the said premises mentioned in plaintiff's bill of complaint were situated within the County of Pacific and in the State of Washington, and that thereupon it appears from the bill of complaint filed herein and the answers of said defendants as well as the cross-bills which said defendants filed with said bill of complaint, and each of said cross-bills filed by each of said defendants, that said Sand Island and said Sites No. 2 and 3 thereon and the premises in controversy were situated in the County of Pacific in the State of Washington; and now your orator shows by way of supplement that your orator has lately discovered, as the fact is, that the said Sand Island and the whole thereof and the said Sites 2 and 3 and the whole [139] of each thereof and the waters surrounding same are not within the County of Pacific and are not within the State of Washington, but that said Sand Island and the whole thereof and the said Sites 2 and 3 and the whole thereof and the waters surrounding the same are and at all times have been wholly included within the County of Clatsop and within the State of Oregon, and are and at all times

have been without and beyond the territorial boundaries of the State of Washington.

III.

Your orator further alleges and shows to this Honorable Court that at the institution of this suit and at the filing of said bill of complaint, for many years prior thereto, the said Sand Island had ever been contended by the citizens and the officials of the State of Washington to be wholly within the boundaries of the State of Washington, and that such claim was practically admitted by the citizens of the State of Oregon, and the Fish Commissioner of the State of Washington at all times held that said Sand Island was included within the territorial boundaries of said State of Washington and the Master Fish Warden of the State of Oregon at all times conceded that the said Sand Island was wholly within the territorial boundaries of the State of Washington and recognized and accepted licenses issued by the Fish Commissioner of the State of Washington for seines used and employed on Sand Island and did not attempt to collect or profess to collect any licenses for seines operated on said island, and your orator at all times believed that the said Sand Island was wholly within the boundaries of the State of Washington until heretofore and on the 16th day of November, 1908, in a suit brought by the State of Washington in the Supreme Court of the United States against the State of Oregon for the purpose of determining the boundary line between the State of Oregon and [140] and the State of Washington, in which suit the State of Oregon was duly and regularly served with subpoena and process and duly

appeared and answered, and after a trial was duly had on the merits adjudged and decreed the boundary line between the State of Washington and the State of Oregon was north of said Sand Island and between the said Sand Island and the north shore of the Columbia River; and further adjudged and decreed that said Sand Island was wholly within the State of Oregon and was within the territorial boundaries thereof.

Your orator therefore alleges by this, its supplemental bill, that the said Sand Island is now and at all times has been within the County of Clatsop and in the State of Oregon and is not and never has been within the County of Pacific or within the State of Washington and is not and never has been within the territorial boundaries of the State of Washington; and your orator further alleges that it is informed and believes and therefore avers that this Court has no jurisdiction over this suit.

WHEREFORE your orator respectfully prays:

First: That if the Court shall be of the opinion that it has jurisdiction in the premises and of this suit, your orator have such judgment and decree as prayed for in its original bill of complaint; and

Second: That should the Court be of the opinion that it has no jurisdiction of this suit that this suit be dismissed and plaintiff go hence without day.

C. W. FULTON,

G. C. FULTON,

Attorneys for Plaintiff.

COLUMBIA RIVER PACKERS' ASSN.,

GEO. H. GEORGE,

Vice-Pres. [141]

State of Oregon,
County of Clatsop,—ss.

I, Geo. H. George, being first duly sworn, depose and say that I am vice-president and general manager of plaintiff in the above-entitled suit; and that the foregoing supplementary complaint is true, as I verily believe.

[Seal]

GEO. H. GEORGE.

Subscribed and sworn to before me this 14th day of September, 1910.

G. C. FULTON,
Notary Public for Oregon, Residing at Astoria,
Oregon.

Commission expires Dec. 11th, 1911.

State of Oregon,
County of Clatsop,—ss.

Due service of the within supplemental bill of complaint is hereby accepted in said county and State, this 15 day of September, 1910.

DORR & HADLEY, and

WELSH & WELSH,

Attorneys for Defendants.

Filed U. S. Circuit Court. Western District of Washington. Sep. 10, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. [142]

*In the Circuit Court of the United States for the
Western District of Washington, Western Di-
vision.*

No. —.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

**Separate Answer of H. S. McGowan to Supplemental
Bill of Complaint, Supplemental Answer to
Original Bill of Complaint, and Supplemental
Cross-bill.**

The answer of H. S. McGowan, one of the defend-
ants to the supplemental bill of complaint of the
Columbia River Packers' Association, Plaintiff.

This defendant, now and at all times hereafter sav-
ing to himself all and all manner of benefit or ad-
vantage of exception or otherwise that can or may
be had or taken to the many errors, uncertainties,
and imperfections in the said bill contained, for an-
swer thereto, or to so much thereof as this defendant
is advised it is material or necessary for him to
make answer to, answering, says:

This defendant admits that the plaintiff filed its
original bill of complaint in this Honorable Court at
the time therein alleged, and against the defendants,

and substantially alleging the matters and things now averred in plaintiff's said supplemental bill. Admits that defendant appeared and filed his answer and cross-bill, wherein it was admitted and averred that said Sand Island, and the fishing sites in controversy in this suit, were situated in Pacific County, in the State of Washington.

By way of further answering the plaintiff's said supplemental [143] bill, this plaintiff denies the allegation that said Sand Island, and the whole thereof, and the fishing Sites 2 and 3, and the whole thereof, and the waters surrounding them, are not now wholly within the State of Washington. Defendant denies that said Sand Island, or any part thereof, or the said Sites 2 and 3, or any part thereof, or the waters surrounding them, or any part thereof, have at all times been, or now are, included within the County of Clatsop, or within the State of Oregon, or without the territorial boundaries of the State of Washington.

This defendant admits that at the time of the institution of this suit, and for many years prior thereto, said Sand Island had been contended by the citizens and officials of the State of Washington, and admitted by the officials of the State of Oregon, to be wholly within the boundaries of the State of Washington, and that the Fish Commissioner of the State of Washington had collected license fees and issued fishing licenses for fishing seines and other fishing gear used and employed at and about Sand Island.

This defendant admits that a suit was brought in

the United States Supreme Court by the State of Washington against the State of Oregon for the purpose of determining the boundary line between said States, and that a decision in said boundary line suit was rendered by said Supreme Court on or about the 16th day of November, 1908, but denies that by said decision or otherwise or at all it appears or is true that said State boundary line now, at this time, lies to the northward of said Sand Island, and denies that said Sand Island, or any part thereof, is now within the territorial limits of the State of Oregon, or without or beyond the territorial limits of the State of Washington. [144]

Further answering, this defendant avers and charges the truth to be that by the said decision of the Supreme Court in said boundary line suit, the true boundary line between the States of Oregon and Washington is the center of the north ship channel of the Columbia River at and in the vicinity of said Sand Island, changed only, as it may be from time to time, through the process of accretion, and this defendant further avers that while it is true that at times in the past, there was a so-called north ship channel in said river, which lay to the northward of said Sand Island, yet, in truth and in fact, the waters of said north channel have since entirely shifted their course and position to the southward of said Sand Island, and that, at the present time, there is no ship channel and no channel at all to the northward of said Sand Island, and that the said so-called north channel which was referred to in the opinion of said Supreme Court in the said boundary line suit, is now, and at

this time, wholly to the southward of said Sand Island.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in the said plaintiff's said bills of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained. [145]

FURTHER AFFIRMATIVE DEFENSE.

By way of a further and supplemental answer and affirmative defense to plaintiff's original and supplemental bills of complaint herein, this defendant avers and charges the truth to be, that on the 19th day of June, 1908, and before any of the fishing licenses had been issued to plaintiff, under which plaintiff is attempting to claim the premises in controversy in this suit, and during the time that said boundary line suit was pending between the States of Oregon and Washington in the Supreme Court of the United States and before the decision of said Court in said boundary line suit was rendered, this defendant did, as a precautionary measure, and for

the purpose of protecting his rights in and to those certain set net fishing locations claimed by him, duly apply to the Master Fish Warden of the State of Oregon, he being the proper and only official of that State having authority to issue fishing licenses for the State of Oregon, for the issuance to defendant of four set net licenses for fishing within the territorial waters of the Columbia River, within the State of Oregon; that this defendant paid the license fees required by the State of Oregon for such fishing licenses, and that on the said 19th day of June, 1908, said Master Fish Warden of Oregon duly issued to this defendant four set net licenses numbered *respectfully* 142, 143, 144 and 145 of the set net fishing licenses of the State of Oregon, and that this defendant held said licenses, and all of them, at all times since the said 19th day of June, 1908, and that said licenses were in full force and effect, at all times after said date for one year, or until long after the time of the rendition of the decision of the Supreme Court in said boundary line suit. [146]

This defendant further avers that he has, agreeably to the laws and customs of the State of Washington, duly and seasonably and annually renewed his said two set net licenses, and each of them, which were issued to him by the Fish Commissioner of the State of Washington on the 15th day of April, 1908, as described in his original answer herein, and under which his said fishing locations were taken and held prior to the attempted occupation of the fishing grounds, in controversy, in this suit, by the plain-

tiff, and that said renewal licenses for the current year are now in full force and effect.

SUPPLEMENTAL CROSS-BILL.

For his supplemental cross-bill, this defendant hereby adopts and repeats all of the foregoing matters and things hereinbefore averred and charged.

WHEREFORE, this defendant prays as in his original answer and cross-bill herein.

DORR & HADLEY,
WELSH & WELSH,

Solicitors for Defendant, H. S. McGowan.

State of Washington,
County of Pierce,—ss.

H. S. McGowan makes solemn oath and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

H. S. McGOWAN. [147]

Sworn to before me this 10th day of November, A. D. 1910.

[Notarial Seal] C. D. SAVERY,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Filed U. S. Circuit Court, Western District of Washington. A. Reeves Ayres, Clerk. By Sam'l. D. Bridges, Deputy. [148]

*In the Circuit Court of the United States for the
Western District of Washington, Western Di-
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

Order Appointing Special Examiner.

Upon reading and filing notice of motion for the appointment of a master or referee herein, with admission of service thereof, it is ordered by the Court that Charles D. Savery be and he is hereby appointed special examiner herein under the 67th rule as amended. The said special examiner shall take the testimony in behalf of both plaintiff and defendants, and is authorized to take the same in the City of Tacoma, District of Washington, or elsewhere according to the stipulation of parties, the taking of the testimony of the plaintiff to be commenced not later than the 20th day of September, A. D. 1910, and to be continued from time to time until completed, and thereafter the testimony of the defendants to be taken according to the convenience and requirements of the parties, at Tacoma or at such other place as they may stipulate. Said testimony shall be given orally by witnesses and be taken down stenographi-

cally by a skilled stenographer approved by the parties or appointed by the Court, and thereafter reduced to typewriting and when subscribed by the witnesses (unless such subscribing be waived) and duly certified, the same shall be admitted in evidence.

Done in open Court in the City of Tacoma, District of Washington, [149] Western Division, this 29th day of August, A. D. 1910.

GEORGE DONWORTH,
Judge.

[Endorsed]: Filed U. S. Circuit Court, Western District of Washington. Aug. 29, 1910. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy. [150]

**[Request of Donworth, District Judge, That
Counsel Appear for Further Hearing.]**

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Plaintiff,

vs.

H. S. McGOWAN,

Defendant.

*	*	*	*	*	*	*	*
*	*	*	*	*	*	*	*

C. W. & G. C. FULTON, for the Several Com-
plainants.

WELSH & WELSH, DORR & HADLEY, HER-
BERT W. MEYERS and C. C. DALTON,
for the Several Defendants.

DONWORTH, District Judge:

I have read the testimony and exhibits in the above-entitled causes and have given the law applicable to the facts such consideration that I will be able to decide the cases promptly after a number of points upon which I desire further light from counsel are cleared up. I, therefore, request counsel in the several cases to appear in court at Seattle at some early date to be agreed upon by them to make clear certain points which have escaped me on account of the lapse of time since the oral argument. If practicable I would like to have this further hearing take place during the week beginning January 8th, not earlier than Tuesday of that week. I shall be in Tacoma on Monday the 8th, and in Seattle the rest of the week.

GEORGE DONWORTH,
District Judge. [151]

[Endorsed]: Filed U. S. District Court, Western District of Washington. Jan. 6, 1912. A. W. Engle, Clerk. By James C. Drake, Deputy. [152]

In the United States District Court, Western District of Washington, Southern Division.

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
Complainant,

vs.

H. S. McGOWAN et al.,
Defendants.

Memorandum Decision on Final Hearing.

C. W. & G. C. FULTON, for Complainant.

WELSH, WELSH & O'PHELAN and DORR &
HADLEY, for Defendants.

DONWORTH, District Judge:

This is a suit in equity originally begun in the United States Circuit Court for the Western Division of this District, and by operation of law the case is now in this court for decision.

Complainant, as the lessee of certain sites on Sand Island in the Columbia River, sues to enjoin the defendants from constructing and maintaining in the waters of that river, below low-water mark, certain fishing appliances known as "set nets," placed there by defendants and held in place by stone anchors, to which were attached chains and buoys. At a former hearing it was held that the Circuit Court of this District had jurisdiction of the suit although Sand Island and the location in controversy were and are on the Oregon side of the boundary dividing that State from the State of Washington. Columbia

River Packers' Association *vs.* McGowan, 172 Fed. 991. The principal facts are stated in the former opinion. [153]

In the limited time at my disposal I am not able to prepare an opinion properly setting forth the reasons by which I have arrived at a conclusion on the merits, and citing the authorities which I have considered. This memorandum, however, will indicate my views on the chief points involved.

1. I adhere to the views expressed in the former opinion (173 Fed. 991), that the location in controversy is within the limits of the State of Oregon.

2. By a reasonable construction of the statute of the State of Oregon ceding Sand Island to the United States and the lease which the United States made to complainant, complainant's rights as lessee extend to the line of ordinary low water.

3. The right of fishery being a common right, no person has an exclusive right in the absence of a statute to fish in any particular waters of the Columbia River. The regulation of this common right as between different individuals is a matter governed by the State statute. It is for the State to say by its statutes what methods of fishery may be employed and how, where and when the different individuals may fish, subject to the paramount laws of the United States for the protection of navigation which are not involved here. A person complying with the provisions of the statute obtains thereby a legal right to fish in the location which the statute authorizes him to appropriate, it being a necessary consequence of the right to regulate that individuals who comply

with the regulations obtain at least a present right to hold and occupy particular locations for fishing purposes. The premises leased by complainant are so situated that it can conveniently prosecute the business of salmon fishing by means of drag seines drawn through the water in front of the premises and hauled upon the [154] shore. No person other than complainant can use the shore at this point for drag seine operations, because to do so would be to trespass upon complainant's leasehold premises. This privilege, however, is a privilege only, consequent upon complainant's having an interest in the land adjoining the water. It does not constitute a right *with* the meaning of the term "riparian or littoral rights" and complainant is not entitled to compensation if it is deprived of that privilege by operation of the fisheries statute. The statutes of both Oregon and Washington authorize various appliances for catching salmon, among others, set nets. They authorize the issuance of set net licenses, the necessary effect of which is to permit the *licenses* to locate a set net in some definite location. These statutes also prescribe a method by which the owner of premises available for drag seine operations may appropriate a location for that purpose in front of his land.

4. It is conceded by complainant's counsel that defendants complied with the statutes applicable to procuring set net licenses and locating appliances thereunder, except for the point (claimed by complainant) that such set nets cannot lawfully be placed so as to interfere with the drag seine fishery con-

ducted by complainant or to interfere with its access to deep water, and except for the further point that the buoys which the defendants anchored to mark the location of their set nets were not marked with the letter "O" and the number of an Oregon license, but carried only the number of the Washington licenses issued to defendants and the symbol required by the Washington statute. Complainant's contention in this regard is twofold: First, that complainant as a riparian or littoral owner is entitled to access at all times to the [155] waters in front of its leasehold premises and is entitled to prevent the placing of any structure or other appliance in those waters which will interfere to any extent whatever with such access, and secondly, that complainant has a right to prosecute the drag seine fishery which attaches to its leasehold as a necessary incident thereto, and that any interference with that right may be enjoined. So far as concerns riparian or littoral rights including the right of access, I hold that before an injunction should issue in favor of a shore owner against the maintenance of fishing appliances authorized by State statute below low-water mark and beyond the limit of private ownership, a real and substantial interference with the shore owner's right of access must be shown. Riparian or littoral rights cannot be used as a means for securing a monopoly of the rights of fishing in the common waters in front of premises bordering on a sea or river. Here it does not appear that defendant's set nets will do more than prevent the drawing of seines below low-water mark. Empty spaces several hundred feet wide are left between the

set nets and they interfere with nothing but complainant's proposed fishing operations in deep water. So far as concerns complainant's claim that any interference with its drag seine operations is an interference with its property rights, I am unable to sustain its contention. Defendants, having a State license to maintain and operate set nets, had a right to choose their location so as to appropriate a certain portion of the common fishery. If they chose a location where complainant intended to operate a drag seine, but for which location it had secured no right under the State law, it was complainant's misfortune. Under the statutes of both States, he who is first in time in securing a location is first in right, and the upland owner is given no [156] advantage as to priority over others. At the time this controversy arose and prior thereto ever since the separation of Oregon and Washington, it was supposed by almost everyone that Sand Island was in Washington. Defendants in selecting their location complied literally with the Washington law and complied substantially with the Oregon law. I think these facts (especially when considered in connection with the concurrent jurisdiction of both States on the Columbia River) give the defendants priority over complainant who had not complied or attempted to comply with the laws of either State. The restraining order issued in complainant's behalf in July, 1908, is still in force and has prevented defendants from continuing their possession of the location ever since. Under such a condition it must be presumed that but for the restraining order the defendants would have lawfully

continued to the present date the possession and rights which they had secured at that time.

5. I have had considerable difficulty in determining the question of fact as to whether defendants acted in good faith in locating the set nets in front of the leased premises. McGowan was an unsuccessful bidder for the leasehold rights. He had formerly conducted drag seine operations at the same place. A number of witnesses have testified that set nets cannot be successfully operated there. If it appeared that defendants located their set nets at that point for the sole purpose of harassing complainant and without any reasonable expectation of making a profit out of the fish to be caught therein, I would grant the injunction prayed for. The presumption, however, is in favor of good faith and the fishing business is one peculiarly subject to uncertainty. I am not [157] able to say from the evidence that it is established that defendants' location of the set nets was merely for the purpose of harassing or embarrassing complainant. They had a right to choose their location and to make reasonable endeavors to catch fish, and the fact that set nets would catch fewer fish than a drag seine at this point cannot determine the controversy.

6. It follows that complainant's prayer for injunction must be refused, and the restraining order heretofore issued must be dissolved. There will be a reference to a master to ascertain the damages recoverable by defendants under the bond given on the restraining order. The measure of damages is one of the subjects discussed by the parties in their briefs.

I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set net location out of which they had been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damage. There will be a reference to a master to ascertain and report the amount of damages. He will consider the evidence already taken so far as it bears upon this point and such other evidence as the parties may introduce within such time as may be allowed by the Court.

An interlocutory decree will be entered accordingly.

GEORGE DONWORTH,
Judge. [158]

Filed U. S. District Court, Western District of Washington. Jan. 24, 1912. A. W. Engle, Clerk.
R. W. Jamieson, Deputy. [159]

*In the District Court of the United States for the
Western District of Washington, Southern Divi-
sion.*

No. 1385.

(Circuit Court.)

COLUMBIA RIVERS PACKERS' ASSOCIA-
TION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J.
P. COYLE,

Defendants.

Interlocutory Decree.

This cause came on to be heard at this term, and was argued by counsel, C. W. Fulton and G. C. Fulton, Esquires, appearing for plaintiff, and Welsh & Welsh and Dorr and Hadley, appearing for defendants and cross-complainants (defendants Walter Bussey and I. N. Stensland having been heretofore dismissed from this suit by consent without costs), and thereupon, upon consideration thereof, it was adjudged and decreed as follows:

That the Columbia River Packers' Association, a corporation, plaintiff herein, shall take nothing by this suit, and that the temporary injunction and restraining order heretofore issued against the defendants upon the application of plaintiff, and entered herein, and the same is now and hereby dissolved and vacated; that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and

J. P. Coyle, were, at the time of the commencement of this suit and ever since have been, and now are, and until the expiration of the current fishing license year hereinafter referred to, will be entitled to the exclusive right to construct, maintain and operate the set nets and other appliances which they had constructed in the months of [160] June and July, 1908, on the fishing grounds hereinafter in this decree described and referred to, and to use the said nets and appliances for fishing; that plaintiff did not have, at the time of the institution of this suit, and has not, at any time since, had any right to interfere with said defendants and cross-complainants in their occupation and use of said nets and appliances, or with the locations therefor, described and referred to in the pleadings in this suit, and that plaintiff's interference therewith was without right, license or authority; that at all times since the commencement of this suit the defendants have had the right and now have the right to reconstruct and to maintain and operate for fishing purposes in said location set nets and appliances of the same kind and character and covering the same area as those which they constructed as aforesaid in the year 1908, that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and each of them, are awarded an injunction as hereinafter set forth against the plaintiff from this time henceforth until the end of the current fishing license year, which said license year will expire on the 31st day of March, 1912, under the provisions of the statutes of the State of Oregon; that the said defendants and cross-complainants, H.

S. McGowan, Erick Lindstrom and J. P. Coyle, also are entitled to personal judgments against the plaintiff and its surety on its injunction bonds (to wit: the United States Fidelity and Guaranty Company), for damages sustained by said defendants and cross-complainants because of their having been deprived by plaintiff of the use of said nets and appliances from the 7th day of July, 1908, the date upon which the said temporary injunction was issued until this date, not, however, exceeding the sum of twelve thousand dollars (\$12,000) as against [161] the said surety, recovery against it being limited to that amount by its undertakings as surety on the two injunction bonds filed herein by and on behalf of said plaintiff.

AND IT IS THEREFORE ordered, adjudged and decreed that the plaintiff, the Columbia River Packers' Association, its officers, agents, attorneys, servants and employees, and all persons acting or claiming, or to claim by, through, or under said Columbia River Packers' Association, be and they are, from this time henceforth, until and during the 31st day of March, 1912, enjoined and restrained from interfering with the quiet and peaceable enjoyment by the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, and by those acting or claiming, or to claim by, through or under them, or either of them, of the right to construct, maintain and operate said set nets and appliances to the same extent and in the same location as said defendants occupied in June and July, 1908, and from interfering with the erection, location or main-

tenance by said defendants in the waters of the Columbia River below the line of ordinary low tide of such piles, buoys, or other things as may be necessary or proper for the purpose of enabling said defendants to comply with the laws of the State of Oregon relating to securing, holding or marking the same set net locations as they occupied in June and July, 1908.

Said fishing locations are situated in the Columbia River off the southerly side of Sand Island, below the line of ordinary low tide, and above, or to the northward of the Government's fairway or channel line, whereat fishing may be carried on with fixed appliances without special Government permits. Said fishing locations are further described as lying immediately to the southward below and in front of the low-tide line which [162] is the south boundary line of Government Sites numbered 2 and 3 lying along the shore of said Sand Island, which said low-tide line is described in the amended bill in this suit as follows:

“A line drawn on the line of low-water mark on the Columbia River on the south side of said island beginning at a point 4,000 feet easterly along low-water mark from a point on low-water mark due west of the United States Monument No. 4 erected on Sand Island by the United States Government surveyors, and so marked; thence easterly along the said shore line to to the east boundary line of Site No. 4 on said Sand Island, said point being a point on said low-water line that would intersect a north and south

line 781 feet distant east of the United States Monument No. 6 erected on Sand Island by the United States Government surveyors, and so marked."

IT IS NOW FURTHER ORDERED, adjudged and decreed that the three defendants and cross-complainants, and all of them, do recover of plaintiff their costs, and disbursements in this suit to be taxed.

ALL OF WHICH IS FINALLY ADJUDGED AND DECREED.

IT IS FURTHER ordered and decreed that for the purpose of determining the amount of damages to be assessed against the plaintiff, this cause is hereby referred to Honorable M. A. Langhorne, a commissioner of this court, residing in the city of Tacoma, Pierce County, Washington, as Master *pro hac vice*, to ascertain and report to this Court the amount of damages suffered by the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of said nets and appliances from and after the seventh day of July, 1908, the date upon which the aforesaid temporary injunction was issued, up to and until the date of this decree; and to that end, said Commissioner may consider the testimony heretofore taken in this cause, and may hear such other and further testimony bearing upon the question and amount of damages sustained and to be recovered as aforesaid, as the parties, or either of them, may offer; that upon the conclusion of the [163] hearing, the said Commissioner shall report his findings and conclusions to this Court, together

with any further testimony which may have been taken before him.

IT IS FURTHER ordered that any additional testimony which may be desired on the part of said cross-complainants shall be taken within twenty days from the date of this decree, and the taking of any additional testimony which may be desired on the part of the plaintiff shall be taken within twenty days thereafter, unless the times are enlarged by stipulation of the parties, or by order of said Special Master.

To all of the above, and to every part thereof, the plaintiff, in open court, duly excepted, and the exceptions were duly allowed by the Court.

All done in open court this the 5th day of February, A. D. 1912.

GEORGE DONWORTH,
Judge.

Filed U. S. District Court, Western District of Washington. Feb. 5, 1912. A. W. Engle, Clerk.
By James C. Drake, Deputy. [164]

*In the District Court of the United States, for the
Western District of Washington, Southern Di-
vision.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
a Corporation,
Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, and J. P.
COYLE,
Defendants.

**Report of Special Master, Including Findings of Fact
and Conclusions of Law.**

To the Honorable Edward E. Cushman, Judge of
the Above-entitled Court:

The above cause having heretofore duly come on for hearing before the Honorable George Donworth, then one of the Judges of this court, upon the right of the plaintiff to enjoin the defendants in this cause from occupying their set net fishing locations described in the pleadings herein; and the Court having heard the evidence thereon and having on the 5th day of February, 1912, entered his interlocutory decree herein whereby the plaintiff's prayer for injunction was denied, and the temporary restraining order theretofore issued against the defendants was dissolved; the Court having in said decree provided that for the purpose of determining the amount of damages to be assessed against the plaintiff this cause should be referred to the undersigned, as Special Master to ascertain and report to the Court the amount of damages, if any, suffered by the defendants and [165] cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of set nets and appliances from and after the 7th day of July, 1908, the date upon which the aforesaid temporary injunction was issued, up to and until the date of said interlocutory decree; and the Court having further provided in said decree that the said Commissioner should consider the testimony theretofore taken in this cause and should hear such other and further

testimony bearing upon the question of the amount of damages sustained and to be recovered, as aforesaid, as the parties, or either of them might offer, and said decree having further provided that said Commissioner should upon the conclusion of the hearing, report to this Court his findings and conclusions, together with any further testimony taken before him, as aforesaid; and the parties having heretofore, to wit: on the 23d, 24th and 25th days of April, 1912, taken further testimony before the undersigned, as Special Master, which has been fully transcribed and is herewith submitted and filed as a part of this report; the Special Master having heard and considered said testimony, as well as that previously taken before the Court, and having considered the said decree and also the opinion of the Court on file in this cause, and having heard the arguments of counsel and being now fully advised in the premises, makes the following

FINDINGS OF FACT.

1.

The long-established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location [166] during a given fishing season one-third of the gross catch of fish made at said location during the fishing season; when the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the loca-

tion, he is entitled to one-half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch.

II.

Under the rule for fixing the rental value of fishing locations upon the Columbia River as set forth in finding of fact No. 1, it is impossible to determine the value without ascertaining the amount of the actual or probable catch of fish at a given location for a given season.

III.

The defendants and cross-complainants, up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintiff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911.

IV.

During the entire time of the four fishing seasons mentioned in finding of fact number three (3), the plaintiff occupied the defendants' fishing locations and operated drag seines thereon for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows: [167]

In the year 1908, 150 tons.

In the year 1909, 104 tons.

In the year 1910, 135 tons.

In the year 1911, 390 tons.

Total for four years, 779 tons.

V.

The set nets which the defendants would have operated upon said fishing locations had they not been prevented by plaintiff from occupying the locations would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of 779 tons, the amount shown by finding of fact number four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons.

VI.

I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them, but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons.

VII.

As set forth in finding of fact No. 6, the amount of fish to which defendants were entitled as the [168] rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of the fish for the four seasons was \$130.00 per ton, and the 172

tons of fish were of the value of \$22,360.

VIII.

The defendants and cross-complainants were equally interested in the said fishing locations.

From the foregoing Findings of Fact, I make the following

CONCLUSIONS OF LAW.

I.

The value of 172 tons of fish was the aggregate rental of defendants' fishing locations for the four fishing seasons, and that value is the measure of defendants' damages in the aggregate. The value, as set forth in the Findings of Fact being \$22,360, the defendants are entitled to recover that amount in the aggregate.

II.

The three defendants and cross-complainants, namely, H. S. McGowan, Erick Lindstrom and J. P. Coyle, are equally interested in the damages and should have a judgment accordingly.

MAURICE LANGHORNE,

Special Master.

[Endorsed]: Filed U. S. District Court, Western District of Washington. May 13, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [169]

*In the District Court of the United States for the
Western District of Washington, Southern
Division.*

COLUMBIA RIVER PACKERS' ASSOCIATION,
a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Defendants.

Exceptions to Report of Special Master.

Comes now the above-named plaintiff and files herein its exceptions and objections to the report, findings of fact and conclusions of law made and filed herein by the Special Master heretofore appointed by the above-entitled court.

I.

The plaintiff excepts to finding of fact No. I, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

II.

Plaintiff also excepts to finding of fact No. II, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evi-

dence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein. [170]

III.

Plaintiff also excepts to finding of fact No. III, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

IV.

Plaintiff also excepts to finding of fact No. IV, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

V.

Plaintiff also excepts to finding of fact No. V, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

VI.

Plaintiff also excepts to finding of fact No. VI, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein. [171]

VII.

Plaintiff also excepts to finding of fact No. VII, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

VIII.

Plaintiff also excepts to finding of fact No. VIII, and to the whole thereof, and each and every part thereof, and every finding therein contained, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

IX.

Plaintiff excepts to conclusion of law No. I, and to the whole thereof, and each and every part thereof, on the ground that the same is not supported by the evidence and is contrary to and against the evidence,

and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

X.

Plaintiff excepts to conclusion of law No. II, and to the whole thereof, and each and every part thereof, on the ground that the same is not supported by the evidence and is contrary to and against the evidence, and is also contrary to the rule for the measure of damages announced by this Court in its decision and opinion filed herein.

G. C. FULTON,
Attorney for Plaintiff. [172]

State of Oregon,
County of Clatsop,—ss.

I, G. C. Fulton, being first duly sworn, on oath depose and say: That on May 17, 1913, I served the within and foregoing exceptions to the report of the Master filed herein in the above-entitled suit upon Messrs. Dorr & Hadley, attorneys for defendants, by depositing a copy thereof in the United States postoffice at Astoria, Oregon, enclosed in a sealed envelope, with postage prepaid, addressed to Messrs. Dorr & Hadley, Attorneys at Law, Coleman Building, Seattle, Washington; and I also served a copy of said exceptions upon Messrs. Welsh & Welsh, attorneys for defendants, by depositing a copy of the foregoing exceptions in the United States postoffice at Astoria, Oregon, in a sealed envelope, with postage prepaid, addressed to Messrs. Welsh & Welsh, Attorneys at Law, South Bend, Washington, all on the said 17th day of May, A. D. 1913, said addresses of

said attorneys aforesaid being their regular post-office addresses and places of abode.

G. C. FULTON.

Subscribed and sworn to before me this 17th day of May, A. D. 1913.

[Seal]

A. A. ANDERSON,
Notary Public for Oregon.

Filed U. S. District Court, Western District of Washington. May 19, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [173]

*In the District Court of the United States for the
Western District of Washington, Southern
Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION,
a Corporation,

Plaintiff,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Defendants.

**Motion for Confirmation of Findings and Conclusions
of Special Master, and also for Final Judgment
and Decree.**

Come now H. S. McGowan, Erick Lindstrom, and J. P. Coyle, defendants in the above-entitled cause, by Welsh & Welsh and Dorr & Hadley, their attorneys, and move the Court to approve and confirm the report, findings of fact, and conclusions of law

returned by Hon. M. A. Langhorne, Special Master herein, which report, including said findings and conclusions, is now on file with the records of this cause; and said defendants also move the Court for the entry of final judgment and decree in this action in accordance with said findings of fact and conclusions of law.

WELSH & WELSH, and
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: Service of the within motion is accepted and receipt of copy admitted this 19th day of May, 1913.

G. C. FULTON,
Attorney for Plaintiff.

Filed U. S. District Court, Western District of Washington. May 22, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [174]

[Opinion on Report of Master.]

*In the District Court of the United States, Western
District of Washington, Southern Division.*

No. 1358.

COLUMBIA RIVER PACKERS' ASSOCIATION,
a Corporation,

Complainant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Defendants.

Filed, August 12, 1913.

C. W. & G. C. FULTON, for Complainant.

WELSH & WELSH,

DORR & HADLEY, for Defendants.

CUSHMAN, District Judge.

Complainant, as the lessee of certain fishing sites on Sand Island, in the Columbia River, sues to enjoin the defendants from constructing and maintaining, in the waters of said river, below low-water mark, certain fishing appliances, known as "set nets," placed there by the defendants. Upon a former hearing, it was held that the plaintiff was not entitled to such injunction, and, upon the cross-complaints of defendants, it was held that they were entitled to an injunction against the plaintiff, and that they should recover their damages against the plaintiff and its bondsmen, for which purpose the cause was referred to a Special Master.

In the opinion rendered upon the merits, the Court said: [175]

"I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set net location out of which they have been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the

circumstances affecting the net rental value, it would not, in itself, be the measure of damage."

Upon the special reference, the Master found:

"The long established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season. When the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch."

The Master based the recovery allowed the defendants upon this finding—allowing them one-third of what he found to be the value of their *probable* in 1908, 1909, 1910 and 1911. The cause is now for determination upon plaintiff's exceptions to the Master's report, the chief exception urged being to the foregoing finding, it being contended that the same was contrary to the decision of this Court, as above quoted.

Upon the hearing of the exceptions, the original controversy was argued to considerable extent, but it is held that all questions in the main controversy have been concluded, so far as this Court is concerned, by the decision already rendered. The only matter properly before the Court upon the exceptions

being the question concerning the amount of damages to be awarded and the measure, or rules to be applied in ascertaining such damage. [176]

The complainant excepts to the recovery by the defendants and cross-complainants of anything for the year 1911. This question was fully considered and covered by the interlocutory decree. Plaintiff further excepts to the Master's finding concerning the year 1911, because of the fact that, at the time the suit was instituted, plaintiff occupied Sites Nos. 2 & 3 on Sand Island; the controversy arose over defendants' locations immediately in front of these sites; that, as in the year 1911, plaintiff had leased from the Government an additional site (No. 1), and that its catch of three hundred ninety tons of fish for that year included the fish caught by it in front of Site No. 1, in which defendants would have no interest and which would not be included in the issues in the suit. The question of the number of fish, if any, caught by the plaintiff in front of Site No. 1, in 1911, was gone into upon the evidence and the Court finds the Master's finding concerning that year supported by the preponderance of the evidence.

The Master found that defendants' nets, if their operation had not been prevented by plaintiff, would have taken two-thirds as many fish as were, in fact, caught by plaintiff in its seines. From the testimony offered by the plaintiff, the Master found that it caught, during the years 1908, to and including, 1911, seven hundred seventy-nine tons of fish, two-thirds of which, or five hundred eighteen tons would have been caught by defendants. The Master further

found that the customary rental for fishing locations on the Columbia River, where the lessee furnished all the fishing gear, was one-third of the total catch of fish, which in the present case, for the years involved, would amount to one hundred seventy-two tons of fish, at an [177] average price, for the years mentioned, of One Hundred Thirty Dollars per ton, making a total value for the years mentioned of Twenty-two Thousand Three Hundred Sixty Dollars.

The Court rejected the claim that the total profit of the fishing operations—to which was necessary, not only the site, itself, but the expenditure of money, the labor of men, attention of the lessee and the necessary equipment for such operations—would be the proper measure of damage for loss of the location. Such a method was, as the Court held, too conjectural—necessarily so, because of the uncertainty in calculating the amount of the net profits to be credited to that portion of the investment and work not represented by the location, itself.

This is the sense in which the words used in the former decision were used, rather than in the sense that any method which took into account the probable catch as a basis for computing the rent, was too uncertain and speculative a basis from which to determine the rental value. No effect can be given the following words, found in the decision, by any other construction:

“While the probable catch of fish by means of set nets would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damage.”

Thus it was determined that evidence of the probable catch was admissible for the purpose sought, not to allow the total cost as rental, nor all the profits from the catch, but as a quantity from which to calculate the rental value.

In the *Pacific Steam Whaling Co. vs. Alaska Packers' Assn.*, 72 Pacific, pp. 161 to 165, in considering what damages should be recovered *when has* been wrongfully deprived of a fishing location, where in fixing the probable catch of the plaintiff, the actual catch of the defendant [178] was shown, the Court said:

“But a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages. He can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar.”
(At p. 163.)

Exception is also taken to the insufficiency of the evidence to establish what the plaintiff terms “a custom on the Columbia River, or Lower Columbia River to allow as rental one-third of the catch where the lessee furnishes everything except the site.” It is not clear that the Master used the word “custom” in his finding in the restricted sense, which the plaintiff in its argument seeks to have put upon it. Little, if anything, is shown by the evidence to establish that set net locations had been rented in the lower Columbia River for a rental of one-third of the catch, but it was amply shown that fishing locations on the

Columbia River, generally, were frequently so rented.

Where the matter for consideration concerns a contract, or the action of individuals voluntarily taken with relation to one another, it might be held that the evidence of custom in this case was too meager to justify the conclusion that the parties contracting, or acting, presumably took into account such custom for, in such case, the one invoking the custom would, of necessity, have to show that it was acted upon with such frequency, and was so prevalent as to import knowledge on the part of the parties acting; but the reason for such rule does not apply to this case, for the defendants were not contracting with the plaintiff, or acting in any way in relation to such custom. Plaintiff simply took from them, [179] against their will their fishing site. The Master's finding is simply to the effect that fishing sites on the Columbia River were ordinarily rented for one-third of the total catch, where the lessee furnished all of the gear.

In the interlocutory decree it was held that the defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, were entitled to personal judgments against the plaintiff and its bondsmen. The Master found that the defendants were equally interested in the fishing locations. They will, therefore, have separate judgments, each for one-third the total amount of recovery and each for one-third of the total costs incurred,—each of such judgments to be limited to Four Thousand Dollars, as against the bondsmen, which, taken together,

will make Twelve Thousand Dollars, the face of the bond.

By finding No. VII, the Master found that the average price for fish for the four seasons (1908, 1909, 1910, and 1911) was One Hundred Thirty Dollars per ton, and calculated defendants' damages accordingly. In this finding, it is concluded, that the Master was in error, and that the testimony of the witness McGowan—that One Hundred Thirty Dollars was the average price for fish—although not entirely clear, was intended by the witness to apply to the year 1911. The testimony shows that the average price of fish for 1910 was One Hundred Thirty Dollars; 1909, One Hundred Twenty-five Dollars, and 1908, One Hundred Twenty Dollars. This would affect the first conclusion of law, making the value of the one hundred seventy-two tons of fish Twenty-two Thousand Eighty-three Dollars, instead of Twenty-two Thousand Three Hundred Sixty Dollars, as found by the Master. [180]

The report of the Master is, in all other respects, approved and confirmed.

Filed U. S. District Court, Western District of Washington, Southern Division. Aug. 12, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [181]

*In the District Court of the United States for the
District of Washington, Southern Division.*

No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIA-
TION, a Corporation,

Complainant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Defendants.

Final Decree and Judgment.

Now, on this 22d day of September, A. D. 1913, this cause came on for hearing on the motion of the defendants for the entry of a final decree and judgment herein, the complainant being represented by G. C. Fulton, its attorney, and the defendants being represented by Welsh & Welsh and Dorr & Hadley, their attorneys; and it appearing to the Court that heretofore, to wit, on the 5th day of February, A. D. 1912, an interlocutory decree was entered herein wherein and whereby, among other things, it was ordered and decreed that, for the purpose of determining the amount of damages to be assessed against the complainant in this action, the cause was referred to the Hon. M. A. Langhorne, a Commissioner of this court residing in the city of Tacoma, Pierce County, Washington, as Master *pro hac vice* to ascertain and report to this Court the amount of damages suffered by the defendants and cross-complainants, H. S. McGowan,

Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of the set nets and appliances in said interlocutory decree mentioned from [182] and after the 7th day of July, 1908, the date upon which the temporary injunction was issued against the defendants in this cause, up to and until the date of said decree; and to that end, the said Commissioner should consider the testimony theretofore taken in the cause, and should hear such other and further testimony bearing upon the question and amount of damages sustained and to be recovered as the parties, or either of them, should offer; and upon the conclusion of the hearing, the said commissioner should report his findings and conclusions to this Court, together with any further testimony which may have been taken before him; and it further appearing from the report of M. A. Langhorne, the Special Master appointed in said interlocutory decree, which report is on file herein, that, in pursuance of the terms of said interlocutory decree, he did, on the 23d, 24th and 25th days of April, 1912, proceed to hear testimony upon the subject of damages as in said interlocutory decree directed, and that he heard such testimony as the respective parties desired to submit after which he duly examined the evidence which had theretofore been taken in this cause, pertaining to the subject of damages, and also the evidence which was taken directly before him as Master, and thereafter filed herein his findings of fact and conclusions of law, wherein and whereby it was found that the aggregate damages suffered by the defendants in this action was the sum of \$22,360.00, and that

the three defendants are equally interested therein, for which they should have judgment; and it further appearing to the Court that thereafter, to wit: on the 2d day of June, 1912, this cause came on for further hearing before the Court on the motion of defendants for the confirmation of the findings of fact and conclusions of law, as returned by the Special Master, and also [183] upon the exceptions of the plaintiff to said findings of fact and conclusions of law, and that the Court, having heard the arguments of counsel, and having taken the matter under advisement, thereafter duly examined all the evidence pertaining to the subject of damages which *has* taken at the first trial of this cause, and also all the evidence which was taken before the Special Master and transcribed and returned with his report, and that, after having considered all of said evidence and the law in the premises, and being duly advised, the Court did, on the 12th day of August, 1913, file herein its memorandum decision wherein and whereby it did, in all respects, approve the findings of fact and conclusions of law as returned by the Special Master, with the exception that the Court found that the damages amount to \$22,083.00 instead of \$22,360.00, as found by the Master; and it further appearing to the Court that, by the terms of said memorandum decision, it was found that the defendants are equally interested in the amount recovered herein, and it was directed that separate judgments shall be entered herein in favor of each of the defendants for one-third of the total amount of recovery to wit: one-third of \$22,083.00, and for one-third of the total costs incurred by the

defendants, and that said judgments shall also be entered against the United States Fidelity and Guaranty Company, the surety upon the injunction bonds given by the *complaint* in this cause, each judgment against said surety, however, to be limited to the sum of \$4,000.00; and the cause now coming on regularly for further hearing upon the motion of defendants for judgment in accordance with the memorandum decision aforesaid, the Court being fully advised in the premises,

IT IS THEREFORE now CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, H. S. McGowan, shall recover in this [184] action of and from the complainant, the Columbia River Packers' Association, the sum of \$7,361.00, together with the sum of \$316.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said H. S. McGowan shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is coequal to the extent of \$4,000.00 and no more, but that the complainant, the Columbia River Packers' Association is liable for the whole of said sum of \$7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of this decree at the rate of 6 per cent per annum, and execution may issue therefor.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, Erick Lindstrom, shall recover in this action of and from the complainant, the Columbia River Packers' Association, the sum of \$7,361.00, together with the sum of \$316.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said Erick Lindstrom shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability *if* said surety and of the complainant is coequal to the extent of \$4,000.00 and no more, but that the complainant, the Columbia River Packers' Association, is liable for the whole of said sum of \$7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of [185] this decree at the rate of 6 per cent per annum, and execution may issue therefor.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the defendant, J. P. Coyle, shall recover in this action of and from the complainant, the Columbia River Packers' Association the sum of \$7,361.00 together with the sum of \$361.10 costs taxed herein, the same being one-third of the total costs taxable in favor of the defendants in this action; and the said J. P. Coyle shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above

sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is coequal to the extent of \$4,000.00 and no more, but that the complainant, the Columbia River Packers' Association, is liable for the whole of said sum of \$7,361.00 and costs as taxed, the said amount of judgment and costs to draw interest from the date of this decree at the rate of 6 per cent per annum, and execution may issue therefor. Special Masters' fees fixed at \$250.00 dollars—

ALL OF WHICH IS FINALLY ADJUDGED AND DECREED.

To all of the above and every part thereof, complainant in open court duly excepted, and the exceptions were duly allowed by the Court.

ALL DONE in open court this 22d day of September A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

Filed U. S. District Court, Western District of Washington, Southern Division. Sep. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [186]

In the District Court of the United States for Western District of Washington, Southern Division.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J. P. COYLE,

Defendants.

Engrossed Testimony and Evidence.

BE IT REMEMBERED, that after the above-entitled cause was fully at issue by an order of the Court duly rendered and entered on the 29th day of August, 1910, the said cause was referred to C. D. Savery, Special Examiner, to take the testimony and evidence offered and introduced by the respective parties, and when concluded to report the same to the Court for such further proceedings as the Court should determine. At the taking of the testimony and evidence G. C. Fulton, Esq., appeared for the plaintiff and Messrs. Dorr & Hadley and Messrs. Welch & Welch, appeared for the defendants.

Thereupon the following testimony and evidence was duly taken before said Special Examiner and by him duly returned and reported to the Court, that is to say:

The plaintiff, in order to sustain the issues on its part produced the following testimony and evidence:

The plaintiff by his attorney offered in evidence a certified copy of the records of the Department of the Interior relative to the proclamation of the President of the United States reserving Sand Island as a military reservation. [187]

To the introduction of this document in evidence the defendants, by their attorneys, objected upon the ground that it was immaterial and irrelevant.

Thereupon said document was received and marked as Plaintiff's Exhibit "A," and the same is hereunto attached so marked and made a part hereof.

Plaintiff, by its attorney, then offered in evidence

a certified copy of the articles of incorporation of the plaintiff under the laws of the State of Oregon.

Thereupon said document was received in evidence and marked as Plaintiff's Exhibit "B," and the same is hereunto attached so marked and made a part hereof.

The plaintiff, by its attorney, then offered in evidence a certified copy of the articles of incorporation of the plaintiff as filed with the Secretary of State of the State of Washington, and also a certificate of such Secretary as to the filing thereof.

Thereupon said documents were received in evidence and marked as Plaintiff's Exhibits "C" and "D," respectively, and the same are hereunto attached so marked and made a part hereof.

Plaintiff then offered in evidence a lease from the War Department signed by the Secretary of War to the plaintiff for Sites 2 and 3 on Sand Island.
[188]

Thereupon said document was received in evidence and marked Plaintiff's Exhibit "E," and the same is hereunto attached so marked and made a part hereof.

To the introduction of said lease the defendants, through their attorneys, objected, for the reason that the offered evidence is incompetent, irrelevant and immaterial, and that the lease does not purport to cover any fishing rights, littoral rights, riparian rights, or any interest or right whatsoever, or to vest the lessee with any such interest or right outside of the territorial limits of the grounds or land proper. And further, for the reason that it would be impos-

sible under the law for the War Department of the United States to grant, convey or lease to these defendants, or anyone else, any fishing rights, littoral rights or riparian rights of the shore line of the premises leased by this instrument. And further, for the reason that the offered lease does not purport to cover Sand Island, or any part thereof, which is referred to in the preceding paragraph of this action. It is admitted, however, that the instrument is executed by the officers which it is purported to be executed by, and that they are the officers of the Government as represented, and that the signature purported to be the plaintiff's signature is its signature.

[Testimony of R. A. Hawkins, for Plaintiff.]

R. A. HAWKINS was then called as a witness on behalf of the plaintiff, who, after being sworn according to law, testified as follows:

I reside at Ilwaco in the State of Washington, and have resided there for about thirty years. I am forty-four years of age the twentieth of this month, and am engaged in the fishing business, trapping, seining, etc. I am superintending that kind of work at Ilwaco on both the Oregon and Washington waters in the [189] Columbia River, and I have been interested in the catching of salmon and fish by traps, seines, set nets, etc., for about twenty years, and am familiar with the manner in which such fish are taken in the West on the Columbia River, and have been during such times, and I have been engaged in such business myself, both trapping,

(Testimony of R. A. Hawkins.)

set net fishing and seines. A seine is ordinarily described as a drag net. At present I am in the employ of the plaintiff, the Columbia River Packers' Association, and have been in its employ ever since it was incorporated, and it was incorporated, as I understand, in 1899, on the fifth day of January. The nature of my employment is that of superintendent of fisheries of the plaintiff. The character of the fisheries operated by the plaintiff and in which it has been interested during such times is seining and trapping, and I have superintended from twenty-five to thirty traps each year, and from three to six different seining grounds. I have no seining grounds myself, but I own traps. I am acquainted with Sand Island at the mouth of the Columbia River and have been acquainted with it for about thirty years. That there is and has been during that time only one island at or near the mouth of such river and it has always been called or named Sand Island, and I know of no other island in the river bearing such name. I could not tell its acreage. I should say at the present time it is about three miles long and about one and a half or two miles wide. It is considerably larger than it was when I first knew it. It has moved and the sand has washed up and accumulated on all sides and it has grown in length and width. I do not think the main body has moved since I became acquainted with it. I think it has just merely added on. The witness was then handed Plaintiff's Exhibit "A," hereunto attached, and he stated that the island is much larger now than it was then, but

(Testimony of R. A. Hawkins.)

that it is the same island that is involved in this suit; that the island has moved further north and is more extensive. That formerly the main channel of the Columbia River was north of such island, [190] and when I first came here all of the ships came in on the north side of the island, and since that time the channel has changed to the south side. I am acquainted with Sites numbered 2 and 3 mentioned in Plaintiff's Exhibit "E," as indicated by the map attached thereto; that the map delineated thereon is the map of Sand Island, and that the Sites numbered 2 and 3 on such map are the seining grounds covered by the lease from the United States to the plaintiff. I have been acquainted with these sites since they have been laid out and for some time prior thereto. I used to operate Site numbered 3 for fishing purposes exclusively and for seining purposes in the operation of the drag seines, and I have so operated said sites ever since the Columbia River Packers' Association incorporated until such sites were leased by the Government and the Government then took possession. That Sand Island has been used for fishing purposes as long as I can remember, at least twenty years for seining, and has been used for seining purposes only. An attempt was made to drive fish traps on the west end, but they were taken out by the gill netters and there was no obstruction on the shore that I can remember of. I do not ever remember of any set nets being placed there until Mr. McGowan and others attempted to put them in. I refer to the defendants in this suit and

(Testimony of R. A. Hawkins.)

at the time complained of in this suit. Before that time I never saw or heard of any set nets being operated there or attempted to be operated. That the south shore of said island has been used for the last twenty years exclusively as seining grounds and for no other purpose excepting gill nets bothering the operations of seining considerably. They would fish in the same grounds or waters, but not on the shore. The shores of Sand Island on the south have been used exclusively for the last twenty years for the hauling of seines and the use of seines. The Government took charge about six years ago this coming spring. Before Sites 2 and 3 mentioned in Plaintiff's Exhibit "E" was leased to the Columbia River Packers' Association [191] the defendant, H. S. McGowan, had Site No. 2 and Jack Service had Site No. 3 and I think the Stensland boys had taken out the bids in their name. It was operated by drag seines. I know how these leases were obtained from the Government. The two sites were advertised and private bids were put in therefor. Such advertisements were made by the Secretary of War.

Q. Did you know the bidder for Sites numbered 2 and 3 at the time the bid was let to the plaintiff?

To this question the defendants, by their attorneys, objected on the ground that it was immaterial and not the best evidence.

A. Yes, sir. For 2 and 3 it was the Columbia River Packers' Association, Hansen & Olsen, or it may have been in the name of Chris Hansen and

(Testimony of R. A. Hawkins.)

Jack Service, and I don't know who else. Defendant Henry S. McGowan was a bidder for Sites numbered 2 and 3 at the time the premises were leased to the plaintiff. The Government in its lease generally included about 3,500 feet of the waterfront.

The soil on Sand Island is practically all sand in which grows a wild grass and a few little trees in the middle of the island. I know that the Columbia River Packers' Association paid the rental for the premises as set forth in its lease. I am acquainted with the value of seining grounds on the Columbia River and Sand Island.

Q. What is the value of the premises described as Sites 2 and 3 in this lease, Plaintiff's Exhibit "E"?

[192]

A. I would judge somewhere about \$2,500 per year.

Q. Where is the boundary line between the State of Washington and the State of Oregon as established by the decision of the Supreme Court of the United States in the case of the State of Washington vs. the State of Oregon?

To this question counsel for defendant objected on the ground that it was incompetent testimony and that the Supreme Court itself says that it does not know where it is and the witness could not be presumed to know.

A. On the north side of Sand Island.

Prior to the beginning of fishing operations in the year 1908 the plaintiff, Columbia River Packers' Association, made all necessary arrangements for the

(Testimony of R. A. Hawkins.)

purpose of conducting and operating Sites 2 and 3. We bought seines and boats and employed a larger number of men and by the time fishing operations were begun there the plaintiff had expended fully \$15,000. It had six seines and boats, two launches,, twenty-four horses and employed forty-eight men and had considerable paraphernalia. Fishing operations that year were begun on the second day of July. About the fifteenth day of June, 1911, we discovered that the defendants had placed in the waters in front of said sites immediately below the line of low water, a number of obstructions. The defendants had put in some nine buoys to which were attached wire cables and at the other end anchors, weighing all the way from 300 to a thousand pounds. The buoys were made of cedar bolts and they were probably 250 feet apart and occupied practically the entire front of Sites 2 and 3. These anchors were on the bed of the river and those on the inside you could wade out to at low water. These buoys and anchors were placed only in front of these two sites, and it was impossible [193] to operate the seines with these anchors and buoys in front of said sites or employ such sites for the purpose of operating seines thereon, and such sites are practically valueless for any other purpose. The seines are operated at that point in the following manner: You load your seines on the boats and have your launch pull it out probably 250 or 300 fathoms right out into the river, and you have four horses on the tail line and they pull that down for half a mile, prob-

(Testimony of R. A. Hawkins.)

ably, or three-quarters of a mile, and the boat brings in the head line and then they hitch the horse on and they pull it in. They take a scope of sometimes a mile. That the seines used by the plaintiff on these two sites were from 250 fathoms to 300 fathoms in length. The seines were operated generally on the ebb tide or first of the ebb and the first of the flood. Of course the tide floats these seines and they sweep the entire front and are hauled in on shore and the fish taken therefrom on or near the shore. With these obstructions that the defendants had placed in front of these premises it was impossible to operate seines. When I first saw these buoys there was nothing attached to them. I saw them about the fifteenth or twentieth of June for the first time. The next time I saw them was about two days after that, about the eighteenth. There was attached to two of these buoys a little piece of net in front of Site No. 3. I should judge it was made of seining webb about five-inch mesh. It was about 50 feet long, I would think. It was not possible to catch any fish with such a net. Regular gill net webb is necessary in order to operate a set net with a mesh of about nine or nine and a half inch and made of flax or linen twine. The net attached to these buoys that I speak of was made out of seining net. It was cotton. Fish can only be caught in a set net by gilling them, and it is impossible to gill fish in a seine or cotton webb. There was at this time a piece of gill net attached to the buoy [194] on No. 2 ground. I should judge it was about 50 to 150 feet long. It was tied on at one end only and lay

(Testimony of R. A. Hawkins.)

up and down stream. In such position it was impossible to catch fish. I am familiar with the manner in which set nets are operated. They are generally put in and tied at both ends across a stream where there is not a very strong current, as a rule, where the fish are corralled and gilled therein. When the plaintiff was ready to begin operations I received orders from the plaintiff to remove these buoys and anchors and obstructions, and they were accordingly taken out in front of said premises and placed on shore. The next day we found three or four of similar character replaced in front of the premises about the same way the others were. The main channel of the Columbia River washes the south shore of Sand Island and in operating seines on the shore of such island the main portion of the river is fished. Of course we do not get out in the middle of the channel. The reasonable cost of operating plaintiff's seining outfit at that time was close to \$200 a day. Up to November, 1908, when the Supreme Court of the United States determined the boundary line between Oregon and Washington to be north of Sand Island, the general understanding was that Sand Island was in the State of Washington. We were notified by our Fish Commissioner in Washington to purchase licenses in the State of Washington, and we always took our licenses out in the State of Washington prior to that time. After that we were notified by the Fish Commissioner of Oregon to take out our licenses in Oregon. I know what the general belief and opinion was in the State of Washington as to

(Testimony of R. A. Hawkins.)

what State Sand Island was located in, and it was the general belief and opinion that it was in the State of Washington, and this claim was made by practically all the officials in the State of Washington. I never heard anyone claim that it was in Oregon, and I never knew of the officials [195] of Oregon claiming that Sand Island was in Oregon prior to that decision. I recognize these licenses that have been handed to me and they are the licenses that the plaintiff operated under during the year 1908.

Whereupon the said licenses are offered in evidence by counsel for the plaintiff, not because we admit that the State of Washington had any authority to issue such licenses, but for the purpose of showing that the State of Washington and its officials claimed and exercised the jurisdiction over Sand Island and claimed it to be within the territory of Washington at the institution of this suit, and also to uphold the allegations of plaintiff's complaint. These licenses were numbered 2391, 2392, 2393 and 2394, dated June 30, 1908, and the same were received in evidence and all are marked Plaintiff's Exhibit "F" and are hereunto attached so marked and made a part hereof.

Upon beginning fishing operations for the year 1908 it was necessary to clear the grounds, which was done at an expense of something like \$700.

Counsel for plaintiff then offered in evidence a map prepared by the United States Geodetic Survey of the Columbia River, Sheet No. 1, entrance to Astoria.

(Testimony of R. A. Hawkins.)

This document was received in evidence and marked Plaintiff's Exhibit "G," and the same is hereunto attached and so marked and made a part hereof.

The land marked "Sand Island" represents the land in controversy in this suit, and on the south shore of that island are Sites 2 and 3. In my judgment this is a correct map of the river and Sand Island.

Q. And the boundary between the State of Oregon and the State of Washington is north of Sand Island and between that and the shore of the Columbia River. [196]

To this question counsel for the defendants objected on the ground that it was incompetent.

A. Yes, sir.

Cross-examination.

I have lived in Ilwaco for thirty years past continuously, and have been familiar with the general surroundings there all that time and have been engaged in the fishing business for twenty years, and have been employed by the plaintiff since the year 1899. I was engaged in the fishing business with Mr. Elmore prior thereto and I fished in the vicinity of Sand Island all that time more or less. Sand Island has been growing in four directions—north, south, east and west, and growing larger all the time, and it is somewhere around in the neighborhood of the same relative position that it was thirty years ago. It has moved, I suppose, a little. I could not say exactly how much; sometimes it would wash off, sometimes it would wash on. It has never dis-

(Testimony of R. A. Hawkins.)

appeared entirely. I cannot say how many miles it is now from its original location. It was a little place when it first came and it has been growing to the extent of probably a mile and a half. Of course I do not think it is two or three miles from its original location. I do not think more than one mile. It is somewhere about half a mile that has accumulated on both sides, probably a half a mile and maybe a little more. I think that part of the present island covers the same space that the old island covered, and I am sure of that. I have never surveyed it or anything like that, but I have been on it every day more or less, year in and year out, and my answer is not based on any definite measure, only by my experience on the island. I said formerly the channel was on the north side of the island and now the channel is on the south [197] side of the island. It changed a good many years ago. The tugs and ships have been going on the south side and when I first came there all the ships and tugs went up on the north side. They lay under Cape Disappointment. I think the channel changed about something over twenty years ago and the north channel practically disappeared. It is pretty shoal. It does not go dry at low tide. It is different depths at different places. In the deepest place, which is in Baker's Bay, there is probably about ten or twelve feet of water. Along in the vicinity of the island are two or three spots which they call the "North Channel" now which it would be pretty hard to get the fish boats through at extreme low tide, but at ordinary tide you can get

(Testimony of R. A. Hawkins.)

through there with your launch. I never saw it where I could see the dry land. Of course you can see little spots of sand the other side of the channel.

I cannot give in detail the amount of money that the Columbia River Packers' Association expended in making preparations for fishing there in 1908. Approximately I would say six seines were bought that year, gasoline launches and scows. We did not purchase any horses as we had some and rented some. The 'Columbia River Packers' Association had not been seining on those sites the year before but had been seining on Desdemona Sands, about four or five miles up river from Sand Island and entirely separate from Sand Island but of the same general character. When I first went over to Sand Island and saw these buoys I could not tell whether they had a State license printed on them or not. They had a number on them. I took the number off and wrote to the Fish Commissioner of the State of Washington and found that these licenses belonged to the defendants and when we got ready to seine we took them out. We just pulled them out and then the defendants replaced them. Then we took them out again. We took them out twice; just pulled them out and removed them. I gave instructions to our employees to take them out. The buoys were all below the [198] line of low tide in water from three to ten feet deep. I never saw Mr. McGowan up there. I think the first time we took out these buoys and anchors was some time about the last of June. Mr. McGowan fished Site No. 2 the

(Testimony of R. A. Hawkins.)

previous year. He had the lease for three years. I think that lease was taken out in the name of Mr. Stensland. I don't know whether in his name, but Mr. McGowan was considered the main man who was running them. Prior to that I think Mr. McGowan had a ground over there but I think it took in a part of No. 2 and some of No. 3, and he was operating a seine there *was as* also the Columbia River Packers' Association, although we had different grounds. We had No. 3 and part of No. 2. Mr. McGowan had no set nets out there prior to 1908 and I never knew of anyone else having any there. When I spoke of cleaning the grounds for fishing I mean that it was cleared of the old snags, roots and different things like that. Then there was once upon a time several years ago a party started to operate a fish trap at the lower end, and these piling were broken off and taken out by the gill netters and the same had washed away and the tops taken out and we had to hire a donkey and scow to pull these out in order to pull up our seines.

As soon as we obtained the lease we went right to work and ordered the seines and boats built and acquired everything necessary to operate seines on these grounds. We did not purchase any horses; we had some and rented others. I could not tell whether the buoys and obstructions in front of the island contained the number of the State license but I took the numbers that were painted on the buoys and wrote to the Fish Commissioner of the State of Washington and found that they were owned by the

(Testimony of R. A. Hawkins.)

defendants. I understood these numbers painted on these buoys were intended as license numbers. When we got ready to seine we simply removed all of these buoys; pulled them out; placed them on the island. We were unable to seine unless they were removed. [199] I know the Columbia River Packers' Association paid the rental named in the lease, but I did not see the check signed. We began actual seining on the ground the second day of July.

A set net is made out of eight or nine and a half inch mesh hung on a cork line and lead line and as a rule set in a place where there is no current to amount to much and where the space is confined so that the fish cannot go past. Where they do most of the set netting is where they can put the net from shore to shore and block up the stream and confine the fish below. That is generally the way they set nets. I have never run or operated a net myself on the Columbia River. I had a few set nets over on Willapa Bay, not to amount to much, but have seen a great many operated. The way they are usually held is by driving a big stake on shore and a post on the other shore and stretching the net across the stream. I never saw anyone anchor them in the river and it is not a common practice to do so. I never saw a set net anchored, I mean without driving piles. I do not think it is practical to hold a set net by anchors, that is where there is any tide this cannot be done. You might hold them, but the lead will not. It will float to the top of the water. You cannot fish set nets by anchors. You cannot hold

(Testimony of R. A. Hawkins.)

them. At this particular location there is slack tide at times. The tide rises and falls from five to nine feet daily. The distance between the line of high-water mark to the line of low-water mark on these sites varies, but it averages from 75 to 100 feet. In some places the bed drops off more rapidly than other places. Ordinarily, it is a gradual slope to the channel. The channel there is quite wide and the vessels run pretty close to Sand Island. The last time I measured from Sand Island I measured out 300 fathoms from the shore and the water was from seven to eight fathoms in depth. The principal fish caught at Sand Island is Chinook salmon, bluebacks and silversides. All [200] salmon fish of different varieties and we have different mesh for different kinds of fish. For seines we use from a four inch mesh to say within about five. Some might use a little larger, five and one-fourth. The seine is intended to take all fish that get in its way. Fish caught in set nets are gilled and the mesh must be of considerable size to get their heads in. About nine and a half inch mesh is the common size mesh used in gill nets and set nets. They sometimes fish for the smaller fish such as bluebacks and steelheads with six and a half inch mesh, but very few of these are used. A gill net is described as containing mesh between eight and nine inches accordingly as you wish it. And after you have knit it selvage it with cotton twine, both on the lead line and the cork line, then after it is selvaged you hang the cork line with floats, probably two and a half feet apart; the lead line you

(Testimony of R. A. Hawkins.)

hang with leads probably nine to eleven inches apart. It is operated by taking it out into the river and it is then thrown out of the boat. They average from 250 to 300 fathoms long and about 45 meshes deep and fish are caught therein by the gills. There is considerable difference between fishing a gill net and a set net. Where you have a set net across the stream where you can control the stream, you can fish, but you cannot if it is anchored in a body of water. The fish will come up to the gill net if it is short set, and they will probably leave, and if the net is anchored at the top and a cork line at both ends, and the current is strong it will raise the lead line and the fish will go under it. When you are coming down with the current the gill net stays down and the fish are forced to gill that way. I would not consider that the method of catching fish with a gill net and a set net are the same. There is no set nets practiced on the lower Columbia, down as far as the river at all. None of it has ever been done there.

[201] A set net and a gill net are made out of the same material and the same mesh, but they are operated differently. A set net is stationary, while the gill net floats with the current. And the cork line and the lead line in the gill net come down at the same time with the tide. I should judge that Sites Nos. 2 and 3 for fishing purposes were of the approximate value of \$5,000 per year. I do not know exactly how much fish we caught in 1908, somewhere around 100 tons. I could not say how many fish were caught on Site No. 2. We fished from the top

(Testimony of R. A. Hawkins.)

of No. 3 and drifted down to the bottom of No. 4, as a rule. I could not tell where the fish were caught. I do not know what the difference was between the two sites; I don't think there was much. The first part of the fishing season we did well on No. 3, the last part on No. 2. The practical time for catching salmon on this site begins about July first and lasts until the twenty-fifth of August, when the fishing season is closed by law. It is not profitable to fish before the first of July. I think these salmon which were caught during the year 1908 were worth somewhere around five cents a pound; five or six cents, I am not sure. I would not want to say; the prices vary and there have been so many prices and part of the season would be higher than at other times; but I should say somewhere around about five or six cents. We operated these grounds during the year 1909. In 1908 we put in close to 130 tons to 140 tons, and in 1909 we put in about 100 tons, or a little over. The price for 1909 was five and a half and seven cents, I think. In 1910 we put in somewhere around 130 tons and the price was five and a half and seven cents. These are the two extremes; that is five and a half for the small fish under twenty-five pounds, and seven cents for fish over twenty-five pounds. I could not say for sure how the average for small and large fish were, but it must be about equal, half and half. Some years it runs mostly small and others differently. [202] This year (1910) I think they are about half and half. I think it was about ten years ago that the

(Testimony of R. A. Hawkins.)

gill netters took out the trap that was driven in front of Sand Island. They took it out by force. There were about 4000 gill netters on the river and they took out this trap because it was in their way. On the 20th day of June, 1908, we began cleaning up our ground. I was instructed by the vice-president of the plaintiff to remove these buoys that were placed on said sites by defendants and did so accordingly.

Redirect Examination.

Q. You are asked by counsel for defendants concerning the number of fish caught on these grounds during 1908, 1909 and 1910. Did the Columbia River Packers' Association make any money or did it lose money in the operation of these grounds in 1909?

To this question counsel for defendants objected on the ground that it was immaterial.

A. In 1908 after the fishing season was all over I went over and asked the company how they came out, as I generally do in all my business, and they said they did not quite come out even. That was the first year we operated they didn't come out quite even.

Counsel for defendants moved to strike the above answer as not being responsive and also hearsay.

Q. Did you examine the books?

A. I had mostly to keep track of more than they did, although they had the books. I knew exactly how it was. I was not certain if we had made a few dollars or lost a few dollars, [203] and when the

(Testimony of R. A. Hawkins.)

secretary asked if they had the report made up he was told no, and he said to run over it roughly, that he would like to know.

Q. You have certainly examined it?

A. Yes, sir.

Q. Did you know of your own knowledge whether they made or lost?

A. We lost a little the first year.

Q. What about the year 1909?

To this question counsel for defendants objected upon the ground that the same was immaterial.

A. The second year we lost between four and five thousand dollars.

Q. And the third year?

A. That is this year, I think we made a few dollars.

I saw these sites shortly after the lease was executed by the Government to the plaintiff and none of these buoys were there or in front of said premises. These buoys were arranged from 50 to 60 or 75 feet from below the line of zero tide and there were two buoys on each location, one on the inside and the other on the outside; two buoys to each set net and the distance between these two buoys was about 100 feet. I think there were nine buoys on the inside and nine buoys on the outside, making eighteen buoys altogether, although I am not positive. I do not think they all had two. They might have been there in the night and gone out in the morning, because if the gill netters come along and get caught they would take them out.

[Testimony of E. E. Woodfield, for Plaintiff.]

Mr. E. E. WOODFIELD, a witness on behalf of the plaintiff, after being first duly sworn, testified upon interrogatories propounded to him by counsel for plaintiff, as follows: [204]

I am twenty-eight years of age and live at Astoria, Oregon, and have lived there twenty-eight years, and am a seine fisherman by occupation and have been engaged in such business for the last twelve years. I have been foreman of seining for the last five years, all on the lower Columbia River, and am familiar with the manner of handling seines in the waters of the Columbia River known as the lower Columbia River, and have been, as I have said, for twelve years. I am now in the employ of the Columbia River Packers' Association and have been so employed steadily for the last two years in the capacity of seining foreman. The duties of a seining foreman are in the nature of an overseer, seeing that the grounds are in shape and handling the crew in actual operation. I had charge of Sites 2 and 3 on Sand Island during the years 1908, 1909 and 1910 as foreman for the Columbia River Packers' Association. I had never been on the island before that time, but had been acquainted with it, known it and seen it for the last eighteen years. There is only one island by that name near the mouth of the river. I went on the island on the twentieth of June, 1908, with five men, one gasoline launch, and a team of horses for the purpose of preparing the ground and making

(Testimony of E. E. Woodfield.)

roads to haul fish over, fixing up the houses and making preparations for fishing operations, and we were ready to seine on the second day of July. We began seining on the third day of July. The reason we did not begin on the morning of the second was that they were setting out these buoys and we had orders to take them out. I always thought there were eight buoys, one at the upper end of 3, one on the lower end of Site 2, and the others were distributed between them. I have no knowledge of there being other than eight buoys. I pulled these buoys out on the third day of July. We took out five. We did so under the orders of [205] Mr. R. A. Hawkins, the witness who just preceded me. There were more than that there but that is all we needed to take out at first, and not being acquainted with the ground we did not know exactly where the lines were at the time. We measured the water when we hauled up these five, and the shoalest was four and a half feet, and I think the deepest was a little over eight feet, and were about 60 or 70 feet from the shore. The first ones were made out of large rocks and a hole bored in and a wire cable put through and a cedar bolt put down and the wire running through one end, with the numbers nailed on the bolt. The first ones weighed about six or seven hundred pounds, probably up to a thousand pounds. We could not successfully land our seines with these buoys in there. We waited, I think, until the next day, when they put in more buoys. We were seining when they were put in. Stensland was one of the men who put them in

(Testimony of E. E. Woodfield.)

and the other man, I think, was Walter Bussey. They were on the launch "Standard" owned by Mr. McGowan. We took these buoys out immediately. I had a talk with these men and one asked us what we were doing, and we said we were cleaning the grounds, and he asked if we knew we were destroying other people's property, and we told him that we did, but that we had orders to clear the grounds and he said "That is all we want to see," and went away. I took out seven buoys the second time. They were all in front of Sites 2 and 3. Such sites were valuable only for seining purposes and I do not think they were valuable for any other purpose. When I first went down I saw a net attached to one of these buoys there one or two days. One end of it was attached to the buoy and these two men were hanging on to the other end of it. It was attached to their boat. They were doubtless attempting to fish, but I don't think they could have got any fish. The Columbia River Packers' Association had on these grounds, six seines, six seining skiffs, two gasoline launches, [206] twenty-four head of horses, thirty-seven men, two cooks, a receiving scow, cooking outfit, harnesses, etc. The total value of the equipment, exclusive of horses, was between ten and eleven thousand dollars. The horses were worth about \$250 each. All of this equipment was necessary in order to operate those grounds. We maintained a crew right along of forty-six men, and we also kept twenty-four horses and all the above equipment during the entire season up to the

(Testimony of E. E. Woodfield.)

twenty-fifth day of August, and the expense per day of operating those grounds was not less than \$200. In my judgment they could not have been operated any cheaper to get the full value of the grounds. These sites that I speak of are the ones indicated on the blue-print attached to Plaintiff's Exhibit "E." The State boundary line between Washington and Oregon is supposed to be north of Sand Island.

Cross-examination.

All I know about the location of the State boundary is what I have heard and from maps. I have seen different maps of the Columbia River. The only map I ever saw was printed in the "Astoria Budget." It was gotten out so that persons could tell where to get licenses. This is a newspaper printed at Astoria. This is all I know about it.

The ground where these buoys were never went dry at any stage of the tide. I have fished a little with a set net at Youngs Bay back of Astoria about a mile. A set net is made out of linen twine about thirty or forty meshes deep according to the water and size of fish you want to catch. It is hung on a cork line and lead line, and tied with one end of the net on shore and the other out to a pile. I knew at the time I removed these buoys that they were put there for a set net location. [207] Their license number was on each and was marked with black printing, five or six inches high, on the floats. In 1908 we caught on these grounds over 135 or 140 tons. In 1909 a little over 100 tons, and in 1910, 135

(Testimony of E. E. Woodfield.)

tons, or a little more. We weighed the fish on the grounds at the receiving scow. This same equipment has been used on other ground, excepting the seines, they would have to be altered. The seines must be made to fit the grounds. The company had owned the boats, skiffs, and launches before the lease was executed, excepting one launch which was built new. The company has three or four other fishing grounds.

Redirect Examination.

There were no numbers on any of these set nets placed on the shore, or on the shore or any place except upon the buoys.

Recross-examination.

To use a seine successfully a man should fish when the tide is falling and try to cover as much ground as possible to fully take it in and with these set nets there with the buoys they could not cover any ground except to go out and come right in the way they went out. These set nets, I should judge, were from 300 to 400 feet apart. There were no obstructions between them. But you could not fish at all on the running tide on that space of ground. The seine was over 1500 feet long and you could not take it out and bring it back in that space, and if you had a shorter seine you might just as well not seine at all, for the reason that you could not catch any fish with it. You might, of course, catch some, but it was necessary to employ a seine as big as possible. The bigger they were the more space they covered. It took ten horses to land one of these

(Testimony of E. E. Woodfield.)

seines, four at one end and six at the other. You hitch the horse to [208] the end of the seine and drive them in shore. We lay one end on the beach and go out and come in with the line and keep hauling the line until you get both ends in and then haul in bodily. They catch in one haul all the way from nothing to 400 fish.

**[Testimony of R. A. Hawkins, for Plaintiff
(Recalled).]**

R. A. HAWKINS was recalled as a witness on behalf of plaintiff and testified upon interrogatories propounded to him by counsel for plaintiff, as follows:

Q. I hand you a map attached to the opinion of the Supreme Court of the United States rendered in the case brought by the State of Washington, complainant, vs. The State of Oregon, defendant, decided November 16, 1908, marked "Oregon's Exhibit No. 16, C. C. Dalton and John W. Reynolds, Commissioners," and ask you to examine the island shown on that map within the heavy lines marked "Sand Island" and ask you to state whether or not that is the Sand Island referred to as containing Sites numbered 2 and 3 in the lease, and the island you have been testifying about and from the shore of which you have done the fishing referred to.

A. Yes, sir. That is the island.

Whereupon, counsel for plaintiff offered said map in evidence in the case. It was stipulated, however, between the parties that the map need not be filed but may be considered in evidence and referred to at

the trial of the cause. Counsel for the defendants made the following objection, namely: We have made no objection to the map being referred to without being filed inasmuch as it is part of the decision of the Supreme Court of the United States in the case mentioned by counsel, but we do object to it as incompetent for any purpose in this case, but it may be considered as actually in evidence and may be read at the hearing subject to the above objections.

Stipulation [as to Ownership of Majority of Stock].
[209]

It is stipulated between the respective parties, as follows: It is admitted that the majority of the stock of the plaintiff is owned by citizens of the United States.

Stipulation [as to Anchors and Buoys].

The following stipulation was entered into between the parties to this suit, to wit:

It is admitted that the defendants put in the anchors and buoys referred to in the evidence herein, and also replaced the same from time to time as they were taken out by the plaintiff before the injunction was issued.

Upon the introduction of the foregoing testimony the plaintiff rested.

The defendants to sustain the issues on their part thereupon offered and introduced the following testimony in evidence:

[Testimony of E. A. Coe, for Defendants.]

E. A. COE, a witness on behalf of the defendants, after being duly sworn testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

My name is E. A. Coe and I reside at Svensen, Oregon. At the present time I am in the mercantile business, but for a number of years I was a professional photographer. This picture that I have in my hand was taken from the hill back of Fort Columbia, State of Washington, looking towards the mouth of the Columbia River. I took it in the month of May, 1909.

Counsel for defendants then offered the photograph which the said witness identified, in evidence. To the introduction of the same in evidence the plaintiff by his attorney duly objected on the ground that the same was immaterial and [210] irrelevant and not within the issues.

Whereupon said photograph was received in evidence and marked as Defendants' Exhibit No. 1, and the same is so marked and hereunto attached and made a part hereof.

This photograph that I have in my hand was taken by me on the fourth day of July, 1909. Sand Island is indicated on said photograph by the letter "x" in red ink. The Washington shore is indicated by the letter "a." I stood at Scarboro Hill the time the photograph was taken and it was at a stage of low water. The photograph shows the sands showing through the water. You can see the light spots.

(Testimony of E. A. Coe.)

The water is a few inches or a few feet deep; the dark spots show the shoals. At low water a man might, if he had rubber boots on, walk from the shore of the State of Washington to Sand Island, and I have done it, that is, I have walked across here (indicating), but not the entire distance. We took a skiff to go out to Sand Island and had to pull the skiff over the mud and sand out there, and there was no spot in it that I could not have walked with rubber boots on without getting over the tops of the boots. This was on the fourth day of July, 1909. We started from Chinook in the State of Washington. The place I refer to is Sand Island, in the Columbia River, and Chinook is on the mainland, in Washington.

Counsel for the defendants then offered the witness another photograph, which the witness identified and stated and said:

I took it May 21, 1909, at the same time the other was taken. It is correct, that is, as correct as possible to make a photograph and show the scene. It was taken from Scarboro Head on the high land near the shore of the Columbia [211] River, in the State of Washington. The little village is shown on this map; so is Chinook, and it shows the Columbia River. Sand Island is also shown on this photograph, being at a spot marked "x" in red ink. At the time I took this photograph it was low tide.

As I stated a few minutes ago, this picture was taken at the time I started across the Columbia River from Chinook to Sand Island and shows the same

(Testimony of E. A. Coe.)

thing, only that this picture is taken on a large scale. It is the same as the other photograph but on a larger scale. I certainly think a man could walk from the Washington shore to Sand Island at low tide. I am satisfied he could from what I stated a few minutes ago. We took a skiff and went out there and picked our way through these places, and had to walk from here to here (indicating). We walked back and forth, and I know we joked at the time about walking from Oregon to Washington.

Thereupon counsel for plaintiff offered the photograph to the witness just testifying in evidence. Counsel for the plaintiff then and there objected that it was immaterial and irrelevant and not within the issues.

Thereupon said photograph was received in evidence and marked Defendants' Exhibit No. 2, and the same is hereunto attached so marked and made a part hereof.

I am not interested in the result of this action. I came here at the request of the defendant, Mr. McGowan.

Cross-examination.

At the time I took this photograph it was between the hours of seven and nine o'clock at an exceedingly low run out. I think the tide table gave below zero tide. I made the picture when I was asked to make it. I had nothing to do about the [212] selection of the time. The day and date was set for me. I did not attempt to cross from Chinook to Sand Island on that day and neither did anyone attempt to travel

(Testimony of E. A. Coe.)

from Chinook to Sand Island at that time. It was on the fourth day of July that I went from Chinook, Washington, to Sand Island, Oregon. Chinook is northeast from Sand Island, considerably more east than north, and is supposed to be in the neighborhood of a mile and a half or two miles. Guessing at it, it is from between one to two miles. Three of us started in a launch about twenty-five or twenty-six feet long, and couldn't make it, and then took a flat-bottomed skiff along. We couldn't get along with the launch. Making the trip across we rowed the boat probably a quarter of the way. The boat would float in six or eight or ten inches of water. The rest of the distance we walked. I never knew of anybody walking between said places without a boat, or making any attempt to do so. No one would be foolish enough to attempt the trip without a boat, although I think they might make it.

Redirect Examination.

From what I saw and observed and from my experience, I think it would be possible for a man at an ordinary low tide to walk from Chinook to Sand Island.

[Testimony of J. F. Ford, for Defendants.]

J. F. FORD, a witness on behalf of defendants, after being first duly sworn, testified in response to interrogatories propounded by counsel for defendants, as follows:

I am forty-nine years of age; reside at Ilwaco, Washington. I am a photographer by occupation

(Testimony of J. F. Ford.)

and have been engaged in such business for sixteen years. [213]

Here witness was handed a photograph. (Defendants' Exhibit 3.)

I took that photograph in May, last year, and it is a correct picture of the view. It was taken from the center of the bluff called "Cape Disappointment" at Fort Canby, in the State of Washington, and is a picture of the island at the mouth of the Columbia River, and takes in Scarboro Head and Sand Island out to the ocean view.

Counsel for defendant then offered said photograph in evidence. To the introduction of which counsel for plaintiff then and there objected on the ground that the same is incompetent, irrelevant and immaterial and not within the issues.

Whereupon said photograph was received in evidence and marked Defendants' Exhibit No. 3, and the same is hereunto attached and so marked.

I have marked on this picture "Sand Island," also "Scarboro Head" and "Cape Disappointment," and it was from these points I took the picture. Scarboro Head is in the State of Washington, and at the time I took this picture it was low tide. Sand Island is something between two and three miles from Scarboro Head right west. When I took this photograph I was standing in the middle of the bluff at Cape Disappointment in Washington. I took the top of these trees and rocks on the same bluff as I took this. I lose the rocks and catch the sand. I pointed the camera east and took a view of Sand

(Testimony of J. F. Ford.)

Island. I took each photograph separately. Photographs numbered 1, 2, 3 and 4 I took from the same position. Numbers 5 and 6 I moved to a second point on the bluff by the lighthouse and this gives you a view of Sand Island, Scarboro Head and Cape Disappointment looking east. Number 2 is changed two degrees from the southeast from number 1. Number 3 is a few degrees further around to the southeast, and number 4 I would say directly south from [214] Cape Disappointment showing the end of the jetty, and number 5 a little more to the southeast, and number 6 looking west from the lighthouse, and number 7 would be looking northwest. And these views make a continuous connective view of the premises included within said territory and make one panoramic view thereof. (Here witness was handed Exhibit No. 4.) I took this picture on July fourth, the date written on the back thereof. It is a correct view, shows Sand Island to the south, Scarboro Head to the east and looking to the southeast, from the inner side of Sand Island at what is called the bend looking out to the southeast.

Thereupon counsel for defendants offered said photograph in evidence, to the introduction of which counsel for plaintiff objected on the ground that the same is incompetent, irrelevant and immaterial and not within the issues.

Whereupon said photograph was received in evidence and marked Exhibit No. 4, and the same is hereunto attached and so marked.

When I took this picture I was possibly a mile and

(Testimony of J. F. Ford.)

a half northwest of the east end of Sand Island. I pointed the camera southeast and we took the channel at low water. The people shown in this photograph are some boys playing ball on the sands between the island and the State of Washington in the channel. It was not hardly dry there, there was about three inches of water. The boys went out with their baseballs expecting to play ball as the sands go dry, but a little wind kept some water on the sands that morning, so they were wading about. The sands were bare north of us at low tide. We waded in this little channel that was left, in the three inches of water. I am acquainted with Sand Island and know it is the one mentioned in this suit, and it is the only island there known as Sand Island. South of this island it is deep water all across the river, and fishing, seining and gill netting [215] are done there. At low tide it is simply a mud flat island to the high land.

Cross-examination.

I took the picture, Defendants' Exhibit 4, about nine o'clock in the morning. Exhibit No. 3 about the same hour but at a different time. The width of the channel between Sand Island and Scarboro Head is close to two miles.

[Testimony of G. B. Hegardt, for Defendants.]

G. B. HEGARDT, a witness on behalf of the defendants, after being duly sworn, in response to interrogatories propounded to him by counsel for defendants, testified as follows:

My name is G. B. Hegardt. I am a civil engineer

(Testimony of G. B. Hegardt.)

by profession and have been actively engaged in that business for the last thirty years. I worked twenty-four years for the United States Government in the capacity of an engineer on the river and harbor improvement and fortification works. I worked first in Illinois seven or eight years and the last sixteen years at Fort Stevens, from 1880 to 1905. Fort Stevens is at the mouth of the Columbia River. I am acquainted with Sand Island and have been acquainted with it since the fall of 1880. I was engaged in such work making numerous surveys for the Government of the United States in that vicinity. Sand Island is a body of land lying between the Washington and Oregon shores, the east line being about two miles west of Fort Stevens.

Thereupon counsel for defendants offered in evidence a plat for identification and the same was received and marked as Defendants' Identification No. 5, and the same is hereunto attached and so marked.

This map is from June, 1908, to the present time. Sand Island is marked in black and this survey was made in June, 1907, and the island was in the same position in 1908. The change [216] is very small. At that time there was no north channel in 1908.

Stipulation [That Plaintiff Has an Objection to Certain Questions, etc.].

It was here stipulated and agreed between the parties that the plaintiff has an objection to all questions touching the present and past locations of Sand Island, and also the question as to whether or not there is a channel between Sand Island and the

Washington shore and all matters relative thereto and all questions propounded to any witness relating to such channel on the ground that the same is incompetent, irrelevant and immaterial and not within the issues, and it is not necessary to note such objections, the same being preserved without repeating same.

The reason the island is in practically the same position is because at low water there is a continuous sandspit between Sand Island and the Washington shore. It is dry then and no channel exists, and this was apparent in June, 1908. And since that time the conditions would not be as favorable for a channel being between the island and Washington as in 1908, because the shoaling is continually going on, continually increasing. I suppose at high tide a boat could come and go in the channel between Sand Island and Washington, that is, boats of light draft could come and go out. Of course, it is impossible at low water or even at mid-tide. There is only one main channel in the Columbia River and that is south of Sand Island. On this map the mid-channel line of 1905 is shown by the continuous black line marked "1905 channel line" on this chart (Defendants' Identification 5) and extends from the sea to Astoria. The main ship channel at the present time is practically on the same line as indicated on the line marked "1905 channel line." Sand Island is not in the same place in the Columbia River that it was in 1854. It has moved considerably north and west. Its movements [217] were gradual, caused by erosion on the south side of the island and accretion on the north side of the island. Sand Island as situated

is entirely north of any channel that is or can be used or employed for boats or vessels or water craft plying such waters. There are, of course, two kinds of boats, sea-going vessels and river steamers that might navigate the waters. As far as sea-going vessels are concerned, I don't think that the north channel of Sand Island has been used since 1875, and in any case not since 1878 or 1879. This map, marked Identification No. 5, is called United States Coast Geodetic Survey. This is prepared from surveys made by the United States engineers as to hydrography. The survey was made in June, 1907, by U. S. engineers. I prepared this map for Mr. McGowan showing the position of the present channel lines with the channel line which existed in 1854. I have marked on this map the boundary line as claimed by Oregon and I took it from the official records and I also put on this map Sand Island in 1854, and it is correctly located from United States survey made at that time. The north channel at that time as shown on this map in red and marked "north channel line, 1854," starting from the ocean and coming easterly and north of Sand Island and joins the main channel directly opposite Fort Stevens. I also placed on the map from the official survey chart of the Coast Geodetic Survey of 1874, the north channel of 1854 and the lines on this map (Defendants' Identification No. 5) are correct and made from the Geodetic Survey of the United States of 1854, and it is the same map that was prepared by the State of Washington and used in the suit between the State of Washington and the State of Oregon to determine the boundary line be-

tween the two States, and the testimony in that case was taken during the year 1906 and I understand this action did not arise until three years later. Since 1906 the [218] changes upon Sand Island have been very small. Since the construction of the jetty and building up of the spit, the changes have been very small, but there are some changes, eroding on the south and building up on the northwest.

Thereupon counsel for defendants offered in evidence the map that the witness had been testifying about. To the introduction of which the plaintiff by its attorney then and there objected, upon the ground that the same was immaterial, incompetent and irrelevant and not within the issues.

Whereupon said plat was received in evidence and marked Defendants' Exhibit No. 5, and the same is hereunto attached so marked.

I stated that Sand Island as given on this plat was made from surveys of the United States Government taken in 1907. There was only one channel in 1907 in that vicinity. The present, or 1907 channel, is about due south of Cape Disappointment, about a mile south of the 1854 channel, and the two channels meet at Fort Stevens. The north channel has disappeared and is now covered by Sand Island and mud flats. This north channel disappeared by encroachment of Sand Island and the filling up of Bakers Bay with sediment and sand washed over Sand Island from the spit and the channel, and also from sediment coming down the river. Sand Island as it existed in 1854 was nearly a mile and a half south at the eastern end and about three miles and a half at

the northern end of the present island, that is, the present island at its northwest end is three and a half miles north of the Sand Island in 1854. The same island in 1854 was south of the north channel line of 1854 and the Sand Island that existed in 1908 and which exists now is entirely north of the present channel in the Columbia River. Sand Island as it exists to-day does not cover [219] any part or portion of the territory, State or ground that was occupied by Sand Island in 1854. The present Sand Island is entirely separated or away from the position of Sand Island in 1854. There is a deep channel between it having as high as sixty feet of water and one mile wide. This channel as it now exists is entirely south of the present existing Sand Island. In 1884 the channel was north of Sand Island. The Sand Island as placed on this map and marked "1854" in red, was placed there by me and was made from the United States Coast and Geodetic Survey of 1854. The blue line marked on this map was placed there by me, that is the blue line marked "boundary line" as claimed by the State of Oregon.

Stipulation [as to Defendants' Exhibit No. 6].

It was here stipulated between the parties that the authenticity of this map is not questioned.

Thereupon counsel for defendants offered in evidence said map, to which the plaintiff, by its attorney, then and there objected upon the ground that the same is immaterial, irrelevant and incompetent, and not within the issues, although it is not questioned that it was made by the United States Geodetic Survey.

(Testimony of G. B. Hegardt.)

Whereupon said plat or map was received in evidence and marked Defendants' Exhibit No. 6, and the same is hereunto attached so marked.

Thereupon counsel for defendants offered in evidence another map, Defendants' Exhibit No. 7, which was received in evidence and marked Defendants' Exhibit No. 7, but counsel for plaintiff objected to the introduction of the same upon the ground that the same is immaterial, incompetent and irrelevant and not within the issues, but does not object to the map that [220] it was not proven, its correctness not being denied.

(G. B. HEGARDT continuing:)

This map was made by the United States engineers and compiled from records actually made. The soundings indicated on this map are the soundings taken by the officers of the United States Geodetic Survey and the figures refer to low-water datum plane. The soundings are expressed in feet and show the depth of the mean of the lower low water. This means that the soundings taken at any time were reduced to the datum plane established by the United States Geodetic Survey and the figures are given in feet. The reason there was no soundings north of Sand Island is because it was not covered by the survey. I think there was no necessity for a survey there for the reason there was no water that could be used for navigation, and it was not necessary to go to the expense of making a survey there. As a general statement, I would say that at low water there is no channel existing between Sand Island and the

(Testimony of G. B. Hegardt.)

Washington shore, and this was apparent in June, 1908, and if there has been any change since it would be that the depths would be getting less, that is the tendency.

Counsel for defendants then offered another map in evidence. To the introduction of which the plaintiff, by its attorney, objected upon the ground that it was immaterial and irrelevant and not within the issues, but made no objection as to its authenticity or correctness.

Whereupon said map was received in evidence and marked Defendants' Exhibit No. 8, and is hereunto attached so marked. [221]

(G. B. HEGARDT continuing:)

This map, Exhibit No. 8, is a map made and prepared by the United States engineers, upon which I have put in red what I claim to be the present location of Sand Island, also the words "the low-water line of Sand Island from 1910, shown in red, is from United States Engineer Department survey hereto attached of the mouth of the Columbia River, June 1910." The paper referred to there is Defendants' Exhibit No. 7, attached hereto. In showing the present location of Sand Island on this plat (Defendants' Exhibit No. 8) in red, I took the data so as to form Defendants' Exhibit 7. I have been making surveys in the vicinity and around Sand Island since 1888 and in Bakers Bay and the mouth of the river from the bar to Astoria.

Starting at the beginning the first record of any survey of Sand Island by the United States Govern-

(Testimony of G. B. Hegardt.)

ment is the survey of 1839; it is shown as Sand Island, and is bare at low water. That is our first record, and from that on Sand Island has increased in elevation and size. Its location in 1839 was well south of where it is now, probably two miles south of the present island, and since that time its movement has been gradually to the north. Taking the center of the present Sand Island and compared with the location of the center of Sand Island in 1839 the distance is probably about three miles north of the location of 1839, and it is to the west also, that is to the north and west. The present Sand Island did not occupy any part or portion of the space or territory of the original island. There is a space of practically two miles between the location of Sand Island in 1839 and its present location. There is a channel between them. The present ship channel is between the 1839 location and the present location. This movement has been gradual by building up on the north and breaking away on the south, that is, the washing was entirely on the south, as a rule. [222]

I am, of course, familiar with the ships and vessels that are engaged in trade and commerce and the only channel used or employed by such ships, or that could be employed by such ships, was south of Sand Island and between Sand Island and the Oregon shore, and it was and would be impossible for such vessels to navigate the waters between Sand Island and the Washington shore at any stage of the tide. The average rise and fall of the tide is counted as seven feet and a half. The tides in the winter-time are as

(Testimony of G. B. Hegardt.)

high as twelve feet above low water in storms, but the average is seven and a half feet, and it is about the same at Astoria and about the same at Ilwaco in the State of Washington; a very little difference. The depth of the water at the present time where Sand Island was in 1854 is between sixty and seventy feet, and this was true in 1908. South of Sand Island as it is now, the water in the channel is from sixty to seventy feet and north of it at low tide it is practically dry from the island to the mainland in the State of Washington.

In making charts the officers of the Geodetic Survey of the United States use as their basis the low-water plane, the high water not being given for the reason that low water is a constant factor in tidal waters and rivers, and it is based upon the records kept from ten to one hundred years, while the high water is a variable quantity and varies from year to year and from season to season, so that the low water is adopted, and all soundings made under the authority of the Geodetic Survey refers to low-water datum and all rises of the tide. The seven and a half foot tide I just referred to, is above low-water datum plane. Now the average between high low water and low low water is generally called zero tide. For instance, you have here three feet above zero and some neap tides two feet above, and you take the average of all low water and call that the average. This is the harmonic plane that is adopted. [223]

Cross-examination.

Q. Pursuing that question of the datum, you speak

(Testimony of G. B. Hegardt.)

of lower low water. What do you mean by that; is that below what is known as zero tide referred to by the Government tide tables, or do you mean zero tide?

A. Zero tide is the average of low low waters.

Q. Then when you speak of zero tide and lower low waters, you mean the same thing?

A. In this particular case it is lower low waters.

Q. Is that zero?

A. That is what is accepted as zero.

Q. Then in going over the tide tables prepared by the Government, wherever it is referred to as zero tide, that is lower low waters?

A. Yes, sir; that is the mean of the lower low waters. I am well acquainted with Ilwaco and have been for some time. There are railroad docks there. At least there were some, and I suppose they are still standing. I do not know the population of the town of Ilwaco, and I suppose people there are employed in navigating the waters between Sand Island and the Washington shore. I suppose there are gasolene launches and during the fishing season they are probably plentiful. At high tide a great many sail-boats and launches are navigating such waters. I do not think any stern wheel boats navigate these waters, but these waters afford quite a traffic for fishing boats, gasolene launches and sail-boats in the fishing industry. There was very little difference in the condition of the channel, if any, between Sand Island and the Washington shore in 1906, excepting that there was a general filling in of the whole of Bakers Bay, and this filling in has been quite rapid of late.

(Testimony of G. B. Hegardt.)

It has been going on prior to 1906 so that anyone can see that it is only a question of time when there will be no water between Sand Island and the [224] Washington shore. I was the consulting engineer for the State of Washington in the suit brought by that State against the State of Oregon to establish the boundary line between these two States. I was employed by the State of Washington and I gave my testimony in that case. I stated all the facts I had to my knowledge in order to establish the contention of the State of Washington, and it was established in that case that the water was very shoal between Sand Island and the State of Washington, which is the same testimony had there as I have testified here. There is practically no channel between Sand Island and the State of Washington, and all such matters were duly presented to the Supreme Court of the United States at the hearing in that case, and practically all that I testified to in this case was shown in that case. The conditions have changed appreciably since that time; I should say that on the inside of the island I think the water is much shoaler, at least two feet shoaler. I am not prepared to say, however, whether it has increased in the same proportion in the last two years as it had in the two years preceding, but in the case above referred to, State of Washington vs. State of Oregon, it was shown that all of that territory covered by the waters north of Sand Island were shoaling very rapidly.

Q. And the Supreme Court of the United States determined the boundary line between the State of

(Testimony of G. B. Hegardt.)

Oregon and the State of Washington accordingly as delineated on this map by that blue line marked "boundary line as claimed by the State of Oregon"?

To this question counsel for the defendants objected upon the ground it was calling for a legal conclusion.

A. Yes, sir. [225]

Sand Island has always been an island and its identity has always been complete in one solid body and it has always been known as "Sand Island." It has never washed away except it has gradually washed away on one side and filled up on the other. Between Sand Island and the Washington shore there are many pound net fish traps. These are constructed by driving a row of piling in the bed of the river, and it is a disputed question as to whether or not these traps have in any manner contributed to the building up of the sand in the north channel. Of course, where there is silt carried in suspension in the river and meets an obstruction it is likely to be deposited. There are three or four hundred of these traps, but I do not think that these traps are the sole cause, not the principal cause of the shoaling between Sand Island and the Washington shore. In my judgment the principal cause is substantially as follows: The principal deposit is by sand washing over the spit and carried in suspension and forced over by the flood tide into the neutral water, and more sand is carried in suspension than is carried down by the river. It is the sand that is carried by the flood waters into the neutral waters, and it is simply the law of nature

(Testimony of G. B. Hegardt.)

which is the main contributing cause. Of course, these innumerable traps are an incident. The natural tendency for that place to shoal is caused by the current deflecting south and making a spit in waters where the current is slow, or neutral most of the time.

Redirect Examination.

The Government of the United States has been engaged in building a jetty at the mouth of the Columbia River, and I think that these jetties are responsible for most of the filling in in Bakers Bay between Sand Island and the Washington shore, because the place where the wave action takes place is mostly confined [226] between Sand Island and the Washington shore, because the place where the wave action takes place is mostly confined between the end of the jetty and Cape Disappointment, and would not have time to overflow elsewhere, but comes into Bakers Bay and fills it up, and that is the reason. The O. R. & N. found it necessary to abandon their boats to Ilwaco on account of the shoaling of the waters and they now have their station at Megler on the Washington shore. I think the station was built some time in 1906, but I am not sure.

Q. Speaking now with reference to the north channel, state whether or not that has gradually worked to the south; in other words has the water in the north channel been gradually going south until it is now south of Sand Island?

Mr. FULTON.—That is objected to as a conclusion.

A. I would say that where the north channel was

(Testimony of G. B. Hegardt.)

before, of course, there was a channel or space through which the water would flow. The river requires a certain cross-section to take care of the volume of water and when the north channel occupied by the old north channel was filled up, it was natural that the body of water which flowed through that space would move south where it was unobstructed, so that the water really moved south of Sand Island.

Q. Until it is now where?

A. The place marked by the 1905 channel line, on Exhibit 5.

Mr. DORR.—What you mean then is that the water has shifted and gone south instead of the land moving?

A. Yes.

(By Mr. FULTON.)

Q. Then, you have now evolved the doctrine that because the channel has gradually grown shallower and unable to accommodate the water that formerly went through it, that [227] consequently the water goes in another direction and that constitutes the channel.

A. When that question was asked before I did not understand it with reference to a channel, but when they mentioned the water, it is plain, that if there was no space for the water to flow through, it was forced in some direction where it was unobstructed, and that was south, the only direction where it was unobstructed.

Q. Then it would naturally follow that if the same volume of water was in Columbia River when the

(Testimony of G. B. Hegardt.)

major part flowed through the north channel, and the north channel became shallower, more water would run in some other place? A. Yes.

Q. But it would not necessarily follow that the north channel had shifted down there, but simply that the other channel had widened sufficiently to accommodate the water, wouldn't it?

A. The channel would have to widen and move sufficiently to accommodate the water.

Q. Simply the water formerly running through the north channel is now accommodated by the south channel.

A. For the reason that the old north channel is now occupied by sand.

Q. The south channel has always been in existence and it sufficiently enlarged itself to accommodate the volume of water that formerly passed through the north channel?

A. It simply forced the north channel out of existence.

Q. But it did not change the south channel to the north channel did it?

A. In this way that where it was formerly a channel is now occupied by the island and the channel moved with it. [228]

Q. But you don't mean to argue that because the south channel widened sufficiently to accommodate the waters occupying a former channel, that there-upon the south channel was pre-empted by the north channel?

A. No, it combined with the north channel.

(Testimony of G. B. Hegardt.)

Q. Which one is the south channel now; is it the north channel or the south channel?

A. One is the main channel.

Q. It is still the south channel, only it is larger?

A. Yes.

(By Mr. WELSH.)

Q. Is there any north channel now?

A. No, that is out of existence.

Mr. DORR.—Q. And both channels are running through the south part of the river?

A. Yes.

Mr. FULTON.—Q. You mean that the water that formerly ran through the north channel is now running through the south?

A. Yes.

Mr. WELSH.—Q. The north channel having shoaled up?

A. Yes, disappearing and being forced out of existence.

[Testimony of H. S. McGowan, for Defendants.]

H. S. McGOWAN, a witness on behalf of defendants, after being duly sworn, testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

My name is H. S. McGowan. I am one of the defendants in this suit. I am forty-four years of age and reside at McGowan, Pacific County, Washington. I was born there and have resided there most of my life. I am acquainted with the other defendants, J. P. Coyle and Erick Lindstrom. I have known Sand Island so called [229] since the time of "Great

(Testimony of H. S. McGowan.)

Republic'' wreck, which, I believe, was in the year 1879. This ship was wrecked on what is called the Republic spit, a body of shoal water that is extremely rough and exposed off the south—southwest of the main body of Sand Island. I am engaged in the salmon business, both packing and fishing. We operate at Ilwaco, Washington, McGowan, Washington, and Warrendale, Oregon, the latter place is on the upper river, and the other two are on the lower river in Pacific County in the State of Washington near the mouth of the Columbia River. I have been engaged in such business since about 1882 or '82 or '4, and associated with me in such business are my brothers and father. It is a corporation known as P. J. McGowan & Sons. My father's name is P. J. McGowan. He became engaged in the fishing business at McGowan about 1852. We did not begin canning salmon, however, until 1884, and myself and brothers have practically grown up in the business. I have fished on the south side of Sand Island prior to 1908. The first time I fished there was along about 1896, with traps, and filed notice; that was on the southwest side of the island in the channel that existed there at that time, between the island and Peacock spit. Then it was called the Oklahoma channel, and there were a great number of traps in there and we operated some along with other people. That channel finally became obliterated by the encroachment of sand from Peacock spit and Republic spit, and was gradually filled up. Peacock spit extends from the shore around the environment of Cape Disappoint-

(Testimony of H. S. McGowan.)

ment and Fort Canby, while the Republic spit was outside to the south of Sand Island. The Republic spit was originally a wide shoal that was submerged at all times, and later on some portions of it came up above low water and moved off by the force of the sea towards the north and east, and two or three detached portions came out of the water that have finally become attached to Sand Island. I am familiar with the [230] regulations of the War Department with reference to permitting fixed appliances to be erected and maintained in the lower Columbia River. The War Department drew lines out there to the south and west of the island on both sides running easterly from the Republic and westerly and north-westerly outside of which lines they did not design to permit fixed structures, which in the fishing business would primarily include fish traps, but inside that line under the ruling of the Department they would permit it. This line was generally known as the fairway line and I was inside of that fairway line. I should explain, probably, that inside of that fairway line, as you call it, no permits were required from the War Department. The War Department through its engineers established a line outside of which fixed appliances were not permitted to be erected, but inside of such line no permit was required. I began fishing there along about 1901, I think it was; it may have been 1902, one of those years, with drag seines on a fishing site we purchased from other parties adjacent to where the "Great Republic" wreck was located. I think it was in August, 1901, we pur-

(Testimony of H. S. McGowan.)

chased such site from J. J. Brumbach and Son or J. J. Brumbach individually, I am not entirely clear. We bought from them a seining fishery or seining right. I have with me the bill of sale from Brumbach to McGowan and Sons transferring to McGowan and Sons such fishery and right.

Counsel for plaintiff admitted the execution of this document and the recordation of the instrument accordingly as shown thereon.

Thereupon counsel for defendants offered said bill of sale in evidence together with the certificate of record thereof, endorsed thereon. To the introduction of which the plaintiff by its attorney then and there objected upon the ground that the same [231] is incompetent, irrelevant and immaterial, and for the reason that the premises sought to be transferred were on a military reservation belonging to the United States, but does not question the execution of the instrument or the sufficiency of the proof thereof.

Said instrument was received in evidence and marked Defendants' Exhibit No. 9, and the same is hereunto attached and so marked.

(H. S. McGOWAN continuing:)

The location referred to in this bill of sale is on Sand Island, or rather it is on the shore of the Columbia River on the island, but I do not know whether it is a military reservation of the United States or not. I know the Government claims it as such, and so far as my memory goes, I understand the Government has always made that claim. J. J. Brumbach who signed the document was a private citizen and

(Testimony of H. S. McGowan.)

held no official position at that time.

After acquiring the above document we operated a fishery there for catching salmon fish. We built some temporary camps for housing a crew of men and horses. In the first place we operated from one to two scows. We also built a roadway and a small sort of a dock landing at the end of it. The Government made no objection to any thing we did there, at least not at the time we purchased it, or for some years after, one or two years after, I believe. During all the time we operated there we obtained our licenses from the State of Washington. The original licenses were gotten from Mr. Brumbach. He had obtained these from the Washington Fish Commissioner, and after that we secured licenses to ourselves directly from the Fish Commissioner of the State of Washington. I have in my possession the licenses issued to Brumbach. (Witness produces two fish licenses, one numbered 1476, dated July 17, 1901, and the other 1562, dated July 27, 1901, [232] issued to J. J. Brumbach and signed by A. C. Little, Fish Commissioner of the State of Washington.)

Thereupon counsel for defendants offered said licenses in evidence, both of the licenses themselves and the endorsements which appear on the back of the licenses. To the introduction of which in evidence plaintiff by its attorney then and there objected, upon the ground that each of said licenses were incompetent, immaterial and irrelevant.

Whereupon said licenses were received in evidence

(Testimony of H. S. McGowan.)

and marked Defendants' Exhibit 10, and the same are hereunto attached and so marked.

(Witness continuing:)

From that time on to this date we have held fishing licenses for those waters from the State of Washington every year. This fishery described in Exhibit 10 has always been termed the Brumbach fishery. It began at a point outside the shore of Sand Island, probably four hundred feet westerly from the eastern boundary of what is commonly now termed Site No. 2, and running thence westerly along the shore for approximately a distance of 3000 feet to a point west of the "Great Republic," and it extends out into the river to the limits of the ordinary nets that had been used in fishing. These nets were of various lengths running from about 200 fathoms to 250 fathoms in length. Of course they did not extend out into the water that distance. A 250 fathom net would probably have an extreme sweep out into the river of maybe 900 or a 1000 feet. I used this fishery constantly and continuously each year and season and until 1908. This was known to the plaintiff and to everybody in the country who was in the fishing business, and particularly to the plaintiff. One of the plaintiff's main witnesses, Mr. Hawkins, certainly knew it, because I have seen him there frequently on the site when we were operating [233] probably not every year, but over there frequently looking over the fishery and seeing what was caught, and I know it was a matter of common knowledge that everybody knew we owned the Brumbach fishery. Brumbach

(Testimony of H. S. McGowan.)

had operated this fishery for two seasons before he sold it to us. Mr. Brumbach located this fishery upon the ground one or two years before we bought it from him.

The Fish Commissioner of the State of Washington issued to me set net licenses for the year 1908 and these I now have in my possession. They are dated April 15, 1908, and issued to myself. I have two. My codefendants have similar licenses issued to them. These I also have with me. Erick Lindstrom has three and J. P. Coyle has three. Each are dated April 15, 1908, and we had possession of these licenses in June, 1908, and have never transferred them, and they have never been sold. We all located these set net licenses on the fishing grounds on the sixteenth day of June, 1908, and were located by anchoring buoys at each end of the ground covered by each license and fastening the license number to the buoys. The buoys were held in place by means of stone anchors, that is they were stones with holes drilled in; stones probably weighing 300 pounds, and through the holes in the stones wire cables were put and clamped on; wire cable probably 20 or 25 feet long, or 30, and on the other end of the wire cable were fastened suitable cedar buoys, probably four feet long, and about eight or ten inches in diameter, and on these buoys were fastened the license numbers. These license numbers were in black figures on light background; the figures were about seven inches long. There were two buoys to each location and these buoys were located, of course, at the place we intended to

(Testimony of H. S. McGowan.)

occupy for our set nets. All of these buoys were handled in the same manner, and the licenses for each of said sites were attached as I have heretofore indicated. We were working together to a large extent. I know that [234] this was the customary method of anchoring set nets and it was the only practical method, and I was intending in good faith to occupy these locations with set nets and I obtained these licenses for that purpose. The reason I did not obtain licenses from the State of Oregon was that the property was within the State of Washington and the rights were in the State of Washington so far as I know. That was the general understanding. Everybody acted upon that assumption, both private individuals and public officials. I did, however, obtain four licenses from the State of Oregon, and I have these with me. They are numbered O-142, O-143, O-144, O-145. I got them simply so that there would not be any question as to our rights in the State of Washington or the State of Oregon in operating my fishing rights on Sand Island. I knew that there was a controversy existing between these two States over the boundary line and I obtained these licenses accordingly as a protection so that I would have licenses from whichever state that should prevail. These licenses were issued to me on the dates they purport to bear, and I have never transferred them. I had these Oregon licenses merely to protect my rights in fishing there the best I knew how. After the defendants Lindstrom and Coyle and myself had anchored the buoys, I have just men-

(Testimony of H. S. McGowan.)

tioned, I received a call from Mr. Bagnall, Assistant United States Engineer of the Columbia River District, and he informed me that he was investigating a complaint that had been made against me for obstructing navigation.

Counsel for plaintiff objected to the witness detailing a conversation he had with Mr. Bagnall, upon the ground that the same is incompetent, irrelevant and hearsay.

(Mr. McGOWAN continuing:)

That the complaint had been lodged against me by the Columbia River Packers' Association alleging that I was obstructing [235] navigable waters of the Columbia River which were under the jurisdiction of the United States and he was going down to Sand Island in that interest and asked me if I wanted to go. I said yes, I would like to go. Then we got aboard the steamer "Arigo" and proceeded down towards Sand Island and were passing down the channel of the river just south of Sand Island, and when we got a short distance beyond the eastern end of the island we ran across a lot of gill nets which had the river practically blocked all across the channel. He wormed his way around amongst these gill nets a mile or so and came down to the vicinity of where these obstructions were alleged to be, as he said, and looked out across the west and could not see them; he then asked me where they were. I told him where they were and he pulled in close to the shore, as close to Scarboro as he could, and got out his field-glasses and made out some of the buoys along the shore there with

(Testimony of H. S. McGowan.)

his field-glasses. By that time the gill nets had gathered in thicker and closer around him, so he turned his boat about and went back and landed me at our dock and went away.

As a matter of fact, we were not in line of navigation with these buoys. After that I never heard anything further from the War Department. Shortly after that these buoys disappeared. A part or all of them disappeared one day or night, I don't remember which, and I immediately had others prepared and had them replaced. The next thing was that I learned that the Columbia River Packers' Association had forcibly removed my buoys and locations, and I immediately consulted my attorney, Mr. Welsh, for the purpose of getting out an injunction or restraining order to restrain them from interfering with my property and just before the papers were finished, I think it was, the deputy United States marshal appeared on the scene and served some papers on me. These turned out to be the papers in this suit. At the time the papers [236] were served I was actively engaged in preparing papers for my suit against them. Each of these markers cost from five to ten dollars. We placed on the ground sixteen in all; some were removed and some replaced again. I think there were placed on the ground something over twenty of these markers or buoys. The practical fishing season opens at that place usually about the first of July and continues on and until the close of the season, August 25th, I was prepared to fish these grounds, that is my set net

(Testimony of H. S. McGowan.)

locations. We had part of the gear necessary and were preparing the other. I had some gill nets on hand and we were actively engaged in buying some others at that time, and we had expended, I should estimate, several hundred dollars for an outfit that we had secured at that time. All of our set net locations were below and beyond low tide, probably 50 to a 100 feet below the line of low-water mark, extending out into the stream and none were above the line of low tide. We also had a drag seine license for that location that year. It was issued April 1, 1908, and this license was posted on the premises on a board with black letters or figures on a white or light ground, nailed upon a post at each end of the location. The number of that license was 726, issued by the Fish Commissioner of the State of Washington. I had this license at the same place I had posted our former seining licenses on the same premises. There was a post driven in the ground standing up probably five or six feet above the surface. The license numbers were painted on a board or boards in black letters about ten inches long, on a white or light colored ground, and these boards containing the license numbers were then nailed upon this stake in a conspicuous manner. This license number, 726, was placed there immediately after the license was received. It was not issued until the first of April and probably was not received from the Fish [237] Commissioner for a day or two afterward. It was posted, however, during the month of April, 1908. I took a photograph of that monument which marked my drag

(Testimony of H. S. McGowan.)

seine license. I cannot give the exact date it was taken, but it was subsequent to April 1, 1908. I took the picture myself. There are a number of boards nailed to the same post other than the one that carries the number of this 1908 license. These are the licenses of the previous years. The license number did not show very plainly. The weather had beaten the lettering off so that it was indistinct unless you get close up, but the number 726 appears prominently.

Mr. DORR.—The license that the witness is testifying about, which is 726, bears the date of April 1, 1908, and is purported to be a license for one year, ending as it is printed in this blank, March 31, 1908. This would be the day before the date that it was issued, which counsel contends at this time is manifestly an error of the expiration date by the issuing office. We may have to ask some indulgence to prove that if any objection is made against it.

Mr. FULTON.—I will stipulate that this was a mistake in the date; that the date should end on March 31, 1909.

(Witness continuing:)

This license was renewed with the same number for 1910 and again renewed for 1910-11, which is the present license. J. D. McGowan is a brother of mine.

Whereupon counsel for defendants offered the three licenses referred to by the above witness as Defendants' Exhibit No. 11. To the introduction of said licenses in evidence and each thereof, the plaintiff by its attorney then and there objected upon the ground the same are, and each was, incompetent, irrelevant and immaterial. [238]

(Testimony of H. S. McGowan.)

Whereupon said three licenses were received in evidence and marked Defendants' Exhibit No. 11, and the same are hereunto attached so marked.

(Witness continuing:)

The monument located on the ground as shown in the photograph that I have just testified about, shows my license to be No. 726, is located at the eastern end of the location line and it does not cover all the grounds that are in controversy in this case, but it covers a considerable part of it, that is about 3,000 feet, but the plaintiff occupied all of the ground covered by our license numbers. The license covers nearly all of the ground between the end limits of Site No. 2, Site No. 2 lacking about 400 feet.

Thereupon counsel for defendants offered said photograph in evidence. To the introduction of which the plaintiff by its attorney objected on the ground the same is immaterial.

Whereupon said document was received in evidence and marked Defendants' Exhibit No. 12, and the same is hereunto attached so marked.

(Witness continuing:)

This monument shown in Exhibit No. 12 is just about clear of ordinary high tide, and is quite a little ways back of ordinary low tide. I could not say how many feet back from the line of high tide, but it varies a few feet. These tides vary a few feet and at other times hundreds of feet, but at ordinary high tide I should say this post was from 50 to a 100 feet back therefrom.

It ought to be stated that this ground is very

(Testimony of H. S. McGowan.)

materially changed since pound nets were there. At the time pound nets were located there on what is known as the south end of Oklahoma channel, and since that time they have become sanded up by [239] movements of portions of the Republic spit which moved in there on numerous occasions, so that points where the pound nets were originally located are all throroughly sanded up and does not come to the shore line any more at all. I might say that one pound net was on the shore line and was removed in order to get it away from the seines. I operated a pound net there from about 1892 or '93, to about 1896 or 1897. From 1901 to 1908 no one ever disputed my right to operate seines on the Brumbach seining ground. I have renewed my set net licenses that I obtained in 1908 every year since and I have these renewals with me. They are numbered 1431, 1432 for 1908 and ending March, 1909. The renewal number of 1431 was number 430 dated April 1, 1909, ending March 31, 1910.

These renewal licenses were all, after being identified, offered in evidence, being No. 1431, April 5, 1908, renewal No. 430, April 1, 1909, and renewal No. 668, April 1, 1910. To the introduction of which plaintiff by its attorney objected on the ground that the same were, and each was, immaterial and irrelevant, and particularly as to No. 430 and No. 668 for the same reason.

Whereupon said licenses were received in evidence and marked Defendants' Exhibit No. 13, and the same are hereunto attached so marked.

(Testimony of H. S. McGowan.)

Counsel for defendants then offered in evidence the licenses issued by the Fish Commissioner which had been identified by the witness, being No. 1432, dated April 15, 1908, and renewal number 431, dated April 1, 1909, and renewal number 669, dated April 1, 1910, all set net licenses. To the introduction of which plaintiff by its attorney then and there objected upon the ground that the same is immaterial, irrelevant and incompetent.

Whereupon said licenses were duly received in evidence and marked Defendants' Exhibit No. 14, and the same are hereunto attached so marked. [240]

Thereupon counsel for defendants offered in evidence the licenses identified by the said witness, numbers 142, 143, 144 and 145, issued to him by the Master Fish Warden of the State of Oregon under date of June 19, 1909. To the introduction of each of said licenses counsel for plaintiff then and there objected upon the ground that the same are immaterial, irrelevant and incompetent.

Whereupon said licenses were duly received in evidence marked Defendants' Exhibit 15, and the same are hereunto attached so marked.

Stipulation [as to Certain Licenses Issued by Fish Commissioner].

It was then admitted by the plaintiff that the Fish Commissioner of the State of Washington issued to the defendant J. P. Coyle set net licenses numbered 1436, 1437 and 1438, under date of April 15, 1908; that the said Fish Commissioner also issued licenses purporting to be renewals of the last three men-

(Testimony of H. S. McGowan.)

tioned licenses under date of April 1, 1909, bearing numbers respectively 435, 711 and 712, and licenses also purporting to be renewals were likewise issued by the same official under date of April 1, 1910, numbered 660, 661 and 662, and the same admission is made to similar licenses issued to defendant Erick Lindstrom, which consist of the original licenses numbered 1433, 1434 and 1435, each bearing date of April 15, 1908, and with the purported renewals thereof numbered respectively 432, 433 and 434, dated April 1, 1909, and the subsequent purported renewals of the last-mentioned licenses bearing date of April 1, 1910, and numbered respectively 658, 659 and 692, licenses being identical in form and covering the same district, the Columbia River district, as the licenses to H. S. McGowan, already introduced. But plaintiff, through its attorney, objected to the introduction of said licenses in evidence upon the ground the same were, and each was, immaterial, irrelevant and not within the issues. [241]

Q. Now, Mr. McGowan, what was the reasonable quantity of fish, salmon, that could be caught in this fishery which you and the other defendants were enjoined from operating in 1908 by reason of the injunction which issued out of this suit?

To this question the plaintiff by its attorney then and there objected upon the ground that it was incompetent, irrelevant and immaterial. And upon the further ground that a court of equity has no authority to assess damages in this suit, and the plaintiff has a constitutional right to a jury trial on

(Testimony of H. S. McGowan.)

matters of damages, if any were suffered, and further, that the witness is incompetent to testify on that question.

A. It would be a very large quantity. I would estimate that from 150 to 200 tons of fish. The average value per ton in 1908 would be about \$110 per ton. This could not be very well valued between the three of us defendants on a pro rata basis of the number of nets, for the reason that the lower locations were more valuable than the eastern locations. The locations of mine were adjacent to and easterly from what is known as the "Great Republic" wreck, and that is the best piece of fishery ground in that part of the Columbia River.

Q. What, in your opinion, would have been the reasonable amount of fish, salmon fish, for you to have caught on that ground each year, 1908, 1909 and 1910, during which you have been restrained?

To this question counsel for defendants objected upon the ground that it is immaterial, irrelevant and incompetent, and that the Court had no jurisdiction to assess damages against plaintiff in equity; that the plaintiff was entitled to a jury [242] trial, and that the witness was incompetent.

A. It ought to be easily 50 tons or more per year on my grounds, and I would say that the other territory being more extensive in length might produce about the same amount of fish, about 50 or more tons per year. According to the best of my judgment a reasonable estimate would be 50 tons for each of the three defendants per year. I am talking

(Testimony of H. S. McGowan.)

mostly about Chinook salmon, a certain portion would be what is termed steelheads. They are a fish that are used commercially for canning, mild curing and freezing. The price I have mentioned above would be about the average price for 1908. The average price for 1909 would be about \$120 per ton, and the average price for such fish during the year 1910 would be about \$130 per ton.

I am familiar with the territory between the mainland on the right bank of the Columbia River and Sand Island. Extending from the north shore of the river west from Fort Columbia along what is termed Chinook beach down past the town of Chinook and for a considerable distance below Chinook, probably a distance of perhaps three miles, and extending diagonally down the stream off the shore over to Sand Island it is a big shoal or tide flats. At mean low tide and fair weather conditions when there is no disturbance in the wind or storms, there is not any navigable water out in that country. There are some pot holes and small sinks, or something of that sort, here and there, and bunches of high sands dotted along, but it is dry and not navigable, partly covered sand and partly mud flats. It is not navigable up and down the river at low tide, not even with a canoe. Nothing that a man could ride in would navigate there. I have never walked continuously out there because it is pretty muddy in places, but I have been over all of the flats from time to time clear [243] out to Sand Island. I have been out there on foot but I have not walked

(Testimony of H. S. McGowan.)

it in continuity from the shore to Sand Island, but have been over different parts of it on foot. The conditions that prevailed in June, 1908, and since that time, generally speaking, there has been a gradual upbuilding of all these flats, I have no means of knowing how rapidly that accretion is forming, only I know it gets gradually more pronounced in most places, getting higher each year in most places. In some spots I have noticed it does not change but a little, in others it changes more. There are fishing traps still in operation in Bakers Bay. Down in the Ilwaco end of the bay there are a number of fish traps still operated and in the territory inside, that is towards the Washington shore and upstream from the eastern end of Sand Island there are a great many fish traps, but there is quite a large section in between these points and located between what might be called the central part of Sand Island and Chinook beach out towards the mouth of Chinook River, where practically all of the original traps were, have been abandoned owing to the shoaling up of the water and the absence of any more fish on these flats. The territory that I have just described as being mud flats or sand flats, nearly all get dry at low tide. There are other traps, however, easterly of Sand Island and just shoreward from the eastern end of the island for a short distance where they do not get dry. I have one or two photographs that I took down there where I could find the greatest amount of water at the particular time I took the pictures. I have a couple I think

(Testimony of H. S. McGowan.)

I took in June, 1908. (Here witness produced two pictures.)

When I took these pictures I was standing on the flats about 1,000 feet to the east and north of the inner side of Sand Island between what is called the Island and the Chinook beach shore. The view of them extended towards the Washington shore. [244] This view covers places where there was the most indication of water between Sand Island and the Washington shore. These pictures were taken approximately an hour after the tide indicated as low tide on the tide table. The tide was rising at the time. These pictures were taken, according to the best of my recollection, in June, 1908. I would not be positive as to the exact date, but approximately at that time. I think they were taken between nine o'clock in the morning and half past nine; maybe as late as ten. They were taken at the same time.

Counsel for defendants then offered said photographs just testified to, by said witness, in evidence. To the introduction of the same in evidence counsel for plaintiff then and there objected upon the ground the same are immaterial and irrelevant.

Whereupon said two photographs were received in evidence, marked Defendants' Exhibits 16 and 17 respectively, and are hereunto attached so marked.

(Witness continuing:)

In one of these pictures you will notice a man and a boy, one is my brother and the other is my son.

On the higher part of these tide flats between Sand

(Testimony of H. S. McGowan.)

Island and the Washington shore, generally speaking, there is no vegetation; on the lower part of the flats are the most indications of water, there is water grass growing.

Q. What did you pay for whatever right you acquired from Brumbach?

To this question counsel for plaintiff objected upon the ground that it was immaterial and irrelevant.

A. \$2,000, if I remember correctly. The greater part of it was [245] for fishery rights principally; part of it was for a few old horses Brumbach had, and a couple of sailing skiffs, and two old seines.

I built the wharf that I spoke of some time ago; at a point about what might be termed the center of the inner side of Sand Island proper and running down across the tide flats to a sort of hole or part of a sink located there, conveniently where the boats could come in and make a landing when the tide came up. The outer end of the piling was below the line of low tide, in a hole or sink which was then below low tide. There might have been a foot of water there at low tide, and so far as I know that wharf is there yet, and so far as I know the plaintiff may have used it. The plaintiff has been using the building which I built there so far as I know ever since the summer of 1908, that is, since about July, 1908.

I bought other fishing rights down there other than I purchased from Brumbach. I do not remember the year, but I think it was along about 1904. I pur-

(Testimony of H. S. McGowan.)

chased from Reischman Brothers along about 1904, and I also purchased some alleged rights from a man named Graham, I think in 1905. These fishery rights were westerly from the "Great Republic" wreck adjoining what is known as the Brumbach ground on their eastern end and extending in a westerly direction down the shore. These fishery rights would not be in front of the sites in controversy. Those grounds or fishery rights were located mostly, if not all, in front of Site Number One. They may have overlapped Site Number Two on the west end a few hundred feet possibly, perhaps not. I paid \$3,000 if I remember correctly, for these rights and I took a bill of sale therefor, but I do not have it with me. I do not know whether the plaintiff knew of that purchase, excepting the Graham purchase I mentioned. The Graham purchase of alleged fishery rights was back on the westerly portion of the Reischman premises. I do not know if the plaintiff knew about the Graham [246] purchase, but R. A. Hawkins, who was a witness in this case on behalf of the plaintiff, was a witness to the bill of sale, and he knew it. I have also bought some fish traps down in the same territory, which were located in the channel that I have spoken of as the Oklahoma channel. These are all sanded up, the most of them, I think. I have a photograph or two here showing some of those traps that sand into the island. At the place shown on these photographs which are now apparently covered with driftwood and debris of one sort or another, this was under water at that time

(Testimony of H. S. McGowan.)

from the point where the piling are to the fore background of the picture. That is all portions, the Peacock spit and the Republic spit that have washed in there between 1890 and 1900. These pictures were taken along in the summer of 1908, I think, and were taken by myself. These properties shown in these photographs were fished in the Oklahoma channel as late as 1898 probably. In the immediate foreground I should think that the sand has been blown up by the wind and washed up by the waves, probably from three to six or eight feet above ordinary high tide, and in the background beyond where the piling appears the sand has been washed and drifted by the winds equally high, probably six or eight feet above mean high tide. In 1898 the channel there had gotten quite shoal excepting in pot holes, which were portions of the old Oklahoma channel, that might have been six or eight feet deep at low tide. When these traps were put in there the deepest water in the channel would run about seven to eleven feet. Within a period of approximately ten years, ten to twelve years, it has shoaled up from about eleven feet to practically nothing, that is as a continuous channel. There are holes in it, but the mouth was completely shoaled up by that time. That is to say, where the surface is five or six feet above high tide in 1898, it was some five or six feet below low tide. That would [247] make a range of approximately fifteen feet. This is a fair illustration of the shoaling up of that portion of the territory, that is, ranging over hundreds of acres, probably running a mile

(Testimony of H. S. McGowan.)

and a half in length, and in places, I guess, a mile and a half in width. The shoaling has not been uniform throughout the entire district by any means. I should estimate roughly, that from 25 to 50 traps have been put out of business by this shoaling process. I know about Sand Island having moved. A good while back, along about 1876, '77 or '78, along in there somewhere, the island was very much to the south or southeast of where it has now grown to be. From that time up to the present the main body of the island had grown in the north a very long way, possibly a mile and a half or two miles. It also became very much elongated to the east, connecting with the Chinook flats for a distance of maybe a mile, or a mile and a half. And I knew where the north ship channel was. Sand Island as it is now located is north of what was the north channel. It has moved right across that channel on the north side of Sand Island. One part of the main bulk of the island ceased moving north along about 1888, I should say, but continued to grow in a northerly direction, adding on and enlarging in the direction of the north and slightly to the east, and some to the west, and later on it had grown considerably to the westward, if portions of Peacock and Republic spits might be termed parts of the island now. And I think the northern end has ceased growing practically and there is a general filling up of the flats between the so-called island and shore. It is navigable over these flats when the tide is up, or high tide. The kind of navigation may be stated to be that fisherman ran

(Testimony of H. S. McGowan.)

their fishboats, flat-boats, gill-net boats, and when the tide is up the fish launches run from various places into Chinook and into fish scows that are located around in the neighborhood of Chinook for [248] fish stations, and also to Ilwaco where our cannery is located. There is no regular navigation that passes up and down the river on the north side of the island. There is no navigation there with the exception of one launch that plies on the tide between Ilwaco, Chinook and Astoria. The sort of boats that plies in these waters are all small fish-boats belonging to fishermen or small launches. In the case of this boat which I said plies from Ilwaco to Chinook and Astoria, it is a launch about 50 feet long. I would say there are one or two tow-boats that are operated in towing rafts across out of there at high tide from the Wallicut River, occasionally, not often, and once in awhile from the Chinook River. The ordinary flat-boat used by trappers draws possibly six or eight inches when they are light. Sailing and gill-net boats will draw a foot to a foot and a half, and some two feet of water. They are center board boats. The motor fish-boats used by some fishermen there will draw about two feet of water. These fish carrying launches that ply between there when the tide is up, generally draw about four feet of water. Some of them three and some four. These tow-boats do not ply with any regularity on any route but tow logs occasionally from the Wallicut and Chinook rivers to the mills. The Wallicut River has its mouth about a mile and a half in a generally north-

(Testimony of H. S. McGowan.)

easterly direction from the town of Ilwaco, and the mouth of the Chinook River is about two miles further east than the mouth of the Wallicut. They are really tidal sloughs, not rivers. The loggers haul their logs down into the beds of these streams and at high tide they take them out to a boom for a raft. These logs can be towed only at high tide.

Thereupon counsel for defendants offered in evidence the two last photographs identified by the witness. Counsel for the plaintiff objected to the same upon the ground that each was [249] immaterial, irrelevant and incompetent.

Whereupon said photographs were received in evidence, marked Defendants' Exhibits 18 and 19 respectively, and are hereunto attached so marked.

(Witness continuing:)

There is no navigation that I know of at all passing up and down the river around Sand Island or out through the main mouth of the river from above Sand Island to the mouth of the river below Sand Island, and I would be able to know it if there was. The only boat I know of that goes out through there into the main Columbia from between Fort Canby or Disappointment and Sand Island is the life saving boat which goes out there from Fort Canby life saving station. Of course some fishermen will occasionally get out from there through the breakers, but there is no navigation through there.

I was present at the examination of the two witnesses who testified for plaintiff in this case before the referee on the 15th day of September, 1910, and

(Testimony of H. S. McGowan.)

heard their testimony, I heard what these witnesses said with respect to the ground which myself and co-defendants located with set net licenses, and I heard them make some remark about these grounds being unfit for set net fishing. They are mistaken about it, that is all. They are suitable for set net fishing and I intended in good faith to use them for that purpose, and I would have done so had I not been enjoined in this suit, and I was making all preparations for that purpose and I am able to state that it was a practical way of catching fish at that place with these set nets.

Q. Something was said by the two witnesses to whom you referred as testifying for the plaintiff, that the only evidence of any fishing gear you had out there was a piece of net that was drifting up and down with the current. What are the facts about the installation of your fishing gear, what were you intending to do and planning to do? [250]

A. I had no gear drifting up and down there that I know of. It was intended to be fastened and to fish these locations at favorable portions of the tide, but not to be kept there at all tides, but at tides as were most favorable to fish there. The nets that were being used at that time were two. They were old nets and we were preparing new nets to take their places and to use on other locations.

We employed Walter Bussey and Iver Stensland to take charge of these locations. There was no part of these locations above the line of low tide.

Had I been permitted to fish the locations my en-

(Testimony of H. S. McGowan.)

tire gear and operations would have been located and worked below the line of low tide.

The only reason I ceased to operate there was because I was enjoined by the Court in this action. I had no other reason. Since I have been enjoined, I have done nothing there.

Witness temporarily excused.

**[Testimony of G. B. Hegardt, for Defendants
(Recalled).]**

G. B. HEGARDT a witness on behalf of the plaintiff being recalled, testified in response to interrogatories propounded to him by counsel for the defendants, as follows:

(Interrogated by Mr. DORR.)

Q. Do you know, while you were employed by the engineering corps of the War Department, what the attitude of the Department was on the south side of Sand Island with respect to a fairway line or limiting line beyond which stationary fishing gear was not permitted to be constructed or anchored?

Mr. FULTON.—That is objected to as immaterial.

A. Yes, sir. When that line was laid out as a limiting line beyond which no stationary gear could be erected, there was no objection to putting anything inside of the line and conducting [251] any operations in fishing.

(Witness continuing:)

The Government or War Department did not require specific permits. They were simply allowed to do as they pleased inside of that line, excepting that the State would grant licenses. I know where this

(Testimony of G. B. Hegardt.)

line was and it was outside of Sand Island, and from the testimony given in this case I would say that the lines were outside of Sand Island. I mean by that such lines did not extend out into the Columbia River any further than Sand Island, and the limiting line was further out in the river than these locations.

Cross-examination of G. B. HEGARDT.

(Interrogated by Mr. FULTON.)

The Government permitted stationary fishing gear south of Sand Island and was never changed to my knowledge. If there was any change in this line I never heard of it. I left there in 1905. I know, of course, that the Government in 1905 or 1906 took charge of Sand Island and excluded everybody from it excepting those to whom it granted licenses. At least, I think that was the object. Prior to 1905, the Government did not care who went there on the island. But in 1905 or 1906 the Government took charge under regulations of the War Department and used it for revenue and leased it out to different parties for seining purposes.

[Testimony of H. S. McGowan, for Defendants.]

(Here Mr. McGOWAN, one of the defendants, interrupted the witness and made the following statement as part of his original testimony.)

I now recall previous to 1905, in 1903 or 1904, the War Department did insist upon people who were using drag seines on the Island getting formal permission to drag their seines between the high and low water near the shore of the island. I think that

(Testimony of H. S. McGowan.)

came out first about 1903 and later on in 1905 it was changed into this formal lease system; that is shown in some of the plaintiff's [252] exhibits at the former hearing. These previous permits or permissions were issued merely in the form of a letter of permission with no consideration attached.

This had nothing to do, however, with this limiting line, and had reference only to the use of Sand Island working on the beach, and it had nothing to do with navigation. This had nothing whatever to do with the fishing rights, but was simply a question of regulating the use of Sand Island itself, that the Government claimed to own. That is as I understood it.

**[Testimony of G. B. Hegardt, for Defendants
(Recalled).]**

Witness G. B. HEGARDT continuing:

Now the object of the permits suggested by Mr. McGowan was preventing conflicts that were often going on on the island between the different parties seining there, but the Government never attempted to issue licenses for fishing, and never exercised any control over the fishing itself or the fisheries there. That was a matter purely for the States and was so recognized by the War Department.

Cross-examination.

(Interrogated by Mr. FULTON.)

During the time I was there, no fish traps were ever constructed or operated in the vicinity of Sites 1, 2 and 3, on Sand Island. The bank was very abrupt there and impossible to use traps there. This

(Testimony of G. B. Hegardt.)

ground was used exclusively for seining purposes, excepting on the south and west end. There were traps in front of Site No. 1, south and westerly. That was a great many years ago; I don't remember. I think there was also a trap in front of Site No. 2, and I think they came inside of this line. I do not know who had them. There were none in front of Site No. 3.

Redirect Examination.

(Interrogated by Mr. DORR.)

There was no objection on the part of the Government to [253] locating traps anywhere along on the south side of Sand Island within the limiting line, and this limiting line on the south side of Sand Island is shown on this map that I now have in my hand.

Whereupon, counsel for defendants offered said map in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 20," and the same is hereunto attached, made a part hereof and so marked.

The line that I have referred to as the limiting line is marked on this plat in red ink, as follows: "U. S. Engineer Department, Limiting line, south side Sand Island." I prepared this map. It is a copy of one sent in to the Department from Fort Stevens; it is a copy of an official map, and this line correctly shows the limiting line that was used by the War Department, and that is taken from the official record of the lines established early in 1890. The scale of this map is one ten thousandths. The

(Testimony of G. B. Hegardt.)

shortest distance between the limiting line shown on this map and the line of low water on the south side of Sand Island is 800 feet. The average is over one thousand feet.

Q. Is there any place in front of Site Number Three where the distance is as short as the shortest distance in front of Site Number Two?

A. I may say that that distance referred to as 800 feet is opposite Site Number Two. The shortest distance between the limiting line and the low-water shore line is on the south side of the island in front of Site Number Three, and is one thousand feet, and anywhere within that limiting line the Department made no objection to any kind of gear, fixed, stationary or anything else for fishing purposes. I refer prior to 1905; after 1905, I do not know. [254]

[Testimony of H. S. McGowan, for Defendants.]
(Recalled).]

H. S. McGOWAN one of the defendants, was recalled by defendants, and testified as follows:

(Interrogated by Mr. DORR.)

Counsel for defendants handed witness a map (Defendants' Exhibit No. 20) and requested him to indicate approximately the set net locations owned by the defendants.

The locations made by myself and the other defendants were as follows:

There were four locations in front of Site No. 2 and four locations in front of Site No. 3. There were none further south than this limiting line, and the

(Testimony of H. S. McGowan.)

eight locations were between the limiting line and the line of low tide.

In reply to your question awhile ago as to whether I had anything further to say, there have been remarks relative to desirable locations out there with reference to Site No. 2. I would say that while we were carrying on our seining operations on Site No. 2, which we designated as the Brumbach fishery, we from time to time removed piling from two fish traps that were located in front of what we termed Site No. 1, because those piling and fish traps interfered with our seining operations. One of the traps was located at that point probably 1200 feet easterly from the "Great Republic" wreck and probably 400 or 500 [255] feet westerly from the eastern limit of Site No. 2. The other trap was located at a point 1000 or 1500 feet further to the west but still in front of Site No. 2 and on the beach adjacent.

I fully completed all of our locations. I did not fish there because I was enjoined. I had two old set nets operating there a few days before we were enjoined. I got the permanent location but did not get into permanent fishing operations at all. I had not yet surveyed the locations out. In my judgment the reasonable cost of operating the fishery owned by the defendants in front of these sites would be in the neighborhood of about \$30 a day. The active operative season begins there about the first of July and lasts until August 25th, about fifty-five days. It would require some extra time in making preparation, however, to get to work. For that kind of

(Testimony of H. S. McGowan.)

work it would probably—could be done inside of a week, at the most, two weeks. And at the outside I could figure \$30 a day for seventy days. This does not include gear, material, boats or paraphernalia, but includes the cost of operating, not the wear and tear of gear or material; that would be more. It would require a set of nets, eight of them, as well as extra nets. It might be necessary to have a complete change of nets, that is, to have sixteen nets instead of eight. It might not be absolutely necessary, but it would be very desirable in case some might be damaged to have the other nets to replace them. Besides nets cannot be kept in the water continuously without rapid deterioration. In regard to the total outside cost of everything, I would say that the labor cost would amount to \$30 a day, which would be in the neighborhood of \$2,000 or \$2,100 for the season. It would require in the neighborhood of \$500 worth of webbing that would be used up in the wear and tear probably. It would require lines and rope and other gear to the extent of possibly \$150, outside of the nets themselves, [256] and it would entail deterioration in the value of the boats used, which might be \$100, and it might be essential to employ a special watchman to assist in looking after the nets, which would probably cost \$150 additional. I have estimated the cost of anchors with the cost of other gear independent of the nets. The total would run up in the neighborhood of \$3,000 for the season. It is practicable to operate that fishery without landing on Sand Island at all. The use of

(Testimony of H. S. McGowan.)

Sand Island there is of special value without the use of the adjacent fishery.

The price that I have mentioned, namely, \$3,000 per year, applies to all and each of these three past years, and includes the operation of all the eight set net locations involved in this suit, including the two held by myself and those held by the two defendants. I have treated them all as one fishery. It would be the most economical to operate them together and we had made an arrangement to operate them together.

I was intending to apply these four Oregon licenses on this same territory. The Oregon licenses were not used because of the general understanding that the territory was within Washington. That was common knowledge of everybody, or supposed to be.

The Oregon licenses were procured for this particular location. There was an uncertainty in my mind as to the technical legal status on account of the litigation going on as to the boundary and matters connected with it, and that was a measure of safety. I did that so as to cover it either way in both States, that is to cover the ground.

Cross-examination.

(Interrogated by Mr. G. C. FULTON.)

I purchased these four Oregon licenses as a precaution and I think I purchased them before the decision of the Supreme [257] Court was handed down. After that I obtained the Washington

(Testimony of H. S. McGowan.)

licenses for the same places for these same set net locations for each of the years 1909 and 1910. I did not understand at the time I made these purchases of Washington licenses that the Supreme Court of the United States had held Sand Island was in Oregon. I believed that in the final wind up Sand Island would be in the State of Washington. I believed there would be an arrangement between Washington and Oregon that would fix the boundary south of Sand Island, as a matter of comity between the two States, if for no other reason. I did not think Oregon had anything to give up. My belief was taking all the decision together, that the decision itself could not be made consistent, and I believed that the effect of the opinion must be that Sand Island would be in the State of Washington. That was my construction of the opinion, because it could not be made consistent otherwise. The opinion is absolutely contradictory in its terms, and I construed Sand Island as it stands there to-day is in the State of Washington. And that is my understanding of the opinion of the Supreme Court. But that was not the reason why I obtained no further licenses from the State of Oregon. The reason was simply that I had been enjoined by the Court from proceeding any further, and I did not proceed any further, and that was the only reason. I understood that by obtaining licenses from the State of Oregon to operate these set net grounds I would be violating the injunction, that is, I did not know but what I would. It is true that I obtained from the Fish Com-

(Testimony of H. S. McGowan.)

missioner of the State of Washington set net licenses for the same grounds for the succeeding two years, but the conditions are altogether different. It is true the suit was brought in the State of Washington, but, as I say, conditions were different. The different conditions are that the Washington statute provides for renewal licenses and the Oregon statute, so [258] far as I know, does not. I thought I had a right to renew these licenses regardless of the litigation.

(Here counsel for the plaintiff demanded that the witness produce the statutes of the State of Washington providing for the renewal of such licenses, but the same was not produced. Counsel for the plaintiff then handed to the witness the Session Laws of the State of Washington for 1905, and asked the witness to examine the same and point out the statute authorizing the renewal of Columbia River licenses.)

(Witness continuing:)

A. I do not find what you are discussing.

Q. Your attorney pointed it out. Now the fact is that that refers only to Puget Sound. I will leave the matter of the law of renewals to your attorneys and let them find out. This book I am referring to and handed to the witness by Mr. Dorr and marked under Section 2, Chapter 139, refers only to Puget Sound.

A. I know it has always been the practice down on the Columbia River. The Fish Commissioner has so issued the licenses.

Referring to the Brumbach purchase, I do not wish

(Testimony of H. S. McGowan.)

to be understood as saying we bought any frontage but the fishing rights not on the island but in front of the island. I did not buy any rights on the island. I understood that the Government of the United States claimed the island and were the only ones who were making active claim at the time, and my purchase was of the fishing rights in front of Sand Island and I claim nothing by that transfer of any shore rights. What I do claim under that purchase is that I am entitled to whatever they are good for which is not yet taken. I knew that Brumbach had no title to any shore land or anything beneath the water or on top of the water other than the license might have given him, and I understood [259] the same in regard to the Reischman ground and also the Graham ground. The wharf that I constructed was not on the south shore of the island, but on the inshore and nearly a mile from the ground. The nearest point, I suppose, would be something over half a mile across Sand Island. Both Brumbach, Reischman and Graham had employed the ground that I had purchased from them exclusively for seining purposes, although I am not sure about Graham; I don't know whether Graham ever really seined there. There were some old trap piling on the Graham premises; they were not being used at that time. After I acquired the bill of sale from Brumbach and Son I fished the ground included in his right, whatever that was. It extended from a point about 400 feet westerly of the east end of Site No. 2. I think I began fishing there in 1902, and I fished it

(Testimony of H. S. McGowan.)

in 1903, 4, 5, 6, and 7, I believe. The licenses were in the name, I think, of McGowan Brothers. I did not rent the ground in 1905 from the Government. I never did rent it from the Government; 1905, I think, was the first year the Government put the leases for what they termed Sand Island sites up for auction or rental, or to the highest bidder, and at that time what is termed Site No. 2 was bid in by Stensland, who was the highest bidder. He was a fisherman and was not in my employ. His son was, or one or two of them were in my employ afterwards. He got the bid on his own ground, that is, Site No. 2. The Stensland boys and Stensland himself had long years previously acquired an interest in what is known as the Reischman grounds, in fact their interest was approximately a half interest, and the interest we bought from Reischman being the other interest. They were joint users of that territory and we bought Reischman's rights, but we did not buy Stensland's rights, and that locality was largely on Site No. 1. Possibly a little overlapping on the west end of [260] Site No. 2. Stensland had bought all of Site No. 2 and I made an arrangement with Stensland after he bid in that, for about 1400 feet of that site easterly from the "Republic" wreck, that I wished to use the same that I had been using the Brumbach ground, and the Stensland boys were using the other adjoining on the east. There was some 3,500 feet space and I think about several hundred feet of the boundary of Site No. 2 is what is called the "old Republic" wreck. According to our

(Testimony of H. S. McGowan.)

arrangements I took from the wreck eastward including about 1,400 feet. I think we were using about half of it and Stenslands were using the other half. My half was in the middle and I was to pay them a certain amount in proportion of the cost of it. I think we paid in the neighborhood of \$1,100. Their rental, I think, might have been fifteen or \$1,600 per year. I subleased from Stensland at \$1,100 per year. I think that lease was reduced to writing.

(Here counsel for plaintiff demanded that the witness produce such lease to be used in evidence in this case.)

(Witness continuing:)

I don't remember whether it was reduced to writing, but I do not have it here.

During all the years that I fished these grounds from 1902 to 1907 inclusive, seines were used exclusively. I do not recollect the number of fish we caught in 1902. I suppose we got about 100 tons, or thereabouts; I do not now remember. I do not recall how many we caught in 1903. My general recollection is that the catch was increasing and had increased right along. The grounds were getting in better condition all the time. The average catch of fish there on Site No. 2 during all the years that I had it I think would run from probably—I am talking of the Brumbach ground, that particular place it would run 90 to 160 or 170 tons on what is understood as the Brumbach grounds. This is [261] not practically in Site No. 2. There was several hundred feet of

(Testimony of H. S. McGowan.)

Site No. 2 easterly of the Brumbach ground which was occupied by Stensland. We actively operated two seines. We had other extra seines. Stensland occupied two seines and at times one or two below the wreck of the "Republic." We employed in operating these two seines, I think, a crew of sixteen men, and a cook extra, making an entire crew of seventeen men. We had sometimes eight and seven and one season we had ten horses. We did not use any launches, of course we did sometimes, but as a rule we did not. Our daily expense of operating the entire crew would average in the neighborhood of \$70. We paid our men then by the day; we paid them \$2.50 a day. I do not know what we paid in 1907. I think we employed them one *of* two seasons at \$2.00 or \$2.50 a day, and four bits a ton on the tonnage that they caught. I think it was \$2.00 a day and four bits a ton. Each man got four bits for every ton of fish caught. The average rental of horses was from 30 to 45 or 50 cents a day. The usual price I think was about \$4.00 a day for a team and driver that went with them, together with their keep and the keep of the driver. We furnished board and lodging for all of our employees in addition to their pay.

I bid on this Site No. 2 at the time the Government advertised to receive bids in 1908. I did that to avoid litigation if I could. I do not remember if I bid for Site No. 3 or not, but I bid on Site No. 2 and was an unsuccessful bidder. The Columbia River Packers' Association bid more than I did. The bids, I think, were opened that year sometime prior to

(Testimony of H. S. McGowan.)

May first, 1908, and at the time the bids were opened I knew that the Columbia River Packers' Association was the successful bidder for these two sites and I knew that they bid in these two sites to get my fishery away from me, and I knew that they intended to employ it in hauling seines. Of course I was disappointed to find out that there was an entanglement as to claims and interests down there when I [262] discovered that the Columbia River Packers' Association had outbid me. I did not conceive the idea of corking them. I conceived the idea of desiring to protect my property rights and my idea was simply to protect my property rights, and it was with this idea in view that I obtained the set-net licenses and put in set nets, that is to carry on my fishery there. Had I been a successful bidder for the site I probably would have employed the ground the same as I had previously employed it, that is in seining and I would have done so, I guess.

There were a number of bidders for these seining sites but I do not remember who they were. My understanding was that the lands that were bid in by the successful bidder would be employed for seining purposes. I do not remember the amount of my bid, but it might have been in the neighborhood of a \$1,000. I do not know whether Stensland Brothers bid for either of these sites or not, and it is possible that I may have signed their bond for their bid. I know they were interested and they had in mind bidding and may have made a bid, but I am not entirely clear as to that. I thought I was dealing fairly with

(Testimony of H. S. McGowan.)

the Stensland Brothers in attempting to overbid them when the property was offered for lease, for I intended to be perfectly square with them. I never would have bid in their ground and then taken it away from them. I understood that they had an equity down there, that is my feeling of equity. They had put in work and money down there and had fished in that country and there is a general feeling here among fishermen who are not trying to beat each other, that one man's rights ought to be recognized by another, whether they are legally enforceable or not.

(G. C. FULTON, Counsel for Plaintiff.)

Q. The public records showed at that time (1905) to the Columbia River Packers' Association and to the world, that Stensland Brothers had leased Site No. 2 from the Government?

A. That was in 1905. [263]

Q. In 1907, that is they leased it in 1905 but for three years, and the public record showed that, so that when it was offered for bid again we find you a bidder for it and the Columbia River Packers' Association a bidder for it and the Stensland Brothers?

A. And there might have been others too.

Q. Quite a number of people bid for it. Now if anyone had a right to put out a set net in front of this property, it would not be worth ten cents for seining grounds, would it?

A. I don't think it would.

Q. If Stensland Brothers had been successful in their bid and said to you, "We will charge you a little

(Testimony of H. S. McGowan.)

more than you can afford to pay this year," then you would have a right, according to your theory, to put a lot of set nets out in front of it and absolutely destroy whatever right the Government leased to them.

A. I would not destroy any of their rights because they did not get any. According to my contention I would still have a right to go in front.

Q. Why didn't you put out set nets in front of Site No. 3 in 1905 to 1908?

A. Because I didn't, that was all.

Q. Do you know any reason why you did not?

A. No particular reason, excepting that I didn't want to.

Q. You don't claim that the Columbia River Packers' Association in its leasing from the Government Site No. 3 trespassed upon any of your supposed rights?

A. They did certainly, when they began to operate there.

Q. As to Site No. 3? A. Sure.

Q. I understand you claim you never acquired any of Site No. 3 and did not fish it in 1905, 1906 and 1907? [264]

A. No, I did not operate on Site No. 3 those three years.

Q. You had no interest in Site No. 3 in 1905, 1906 and 1907? A. No.

Q. So that when the Columbia River Packers' Association was the successful bidder for Site Number Three, they did not trespass upon or acquire any fishery rights belonging to you or claimed to belong to

(Testimony of H. S. McGowan.)

you? A. That I had had previously, no.

Q. Then what excuse had you for putting those set nets in front of Site Number Three?

A. I did not have any excuse; I simply had a right; I was exercising my right.

Q. You stated awhile ago as I understood, that the reason you put these set nets in front of Site Number Two was to protect your fishery rights?

A. Yes, that is correct.

Q. Now what reason did you have, if not an excuse, for placing set nets in front of Site Number Three when you knew the Columbia River Packers' Association when it leased this ground from the Government intended to employ it as a seining ground; what reason had you for placing set nets in front of Site Number Three under those circumstances?

A. Because I had a right to and wanted to use it as a fishery; they did not lease any fishery. I did not do anything to the shore line; they leased the shore.

Q. That is your only reason?

A. That was the facts.

Q. That was your only reason?

A. Surely that was my only reason. I wanted to run a fishery there.

Q. You made a rather broad statement awhile ago that you did not consider that the Columbia River Packers' Association [265] was fair in making a bid that was more than you people bid for Site Number Two, because they did not protect your equity, or something substantially to that effect?

A. Well my meaning was that I believed their pur-

(Testimony of H. S. McGowan.)

pose was to go down there and take my fishing rights without consulting me whatever, and I think they did do that.

Q. And you thought that was wrong?

A. Yes, of course I did.

Q. But you still thought you were perfectly right and justified to go upon absolutely new ground in which you had no equity and by placing these alleged set net locations in front of it absolutely prohibit the Columbia River Packers' Association from employing that ground?

A. They simply made war on me and I protected myself the best I could by exercising my rights.

Q. Then you were not telling the truth awhile ago when you said that your only reason for putting set nets in front of Site Number Three was because you wanted to?

A. No, I said to exercise my right of fishery.

Q. You said that was the only reason and now you say the reason was that they declared war on you and you proposed to carry the war to them.

A. That was one branch of the case.

Q. And didn't I ask you if that was the only reason and you said it was? A. No, I think not.

Q. You think that is the statement? A. Yes.

Q. You made the mistake then?

A. Well, I did not put the question, and you put it that way.

Q. Now I understand that because the Columbia River Packers' [266] Association was the successful bidder for Site Number Two, on which you

(Testimony of H. S. McGowan.)

claimed you had a fishery right, you put these set nets in front of Site Number Three in order to carry the war into their territory?

A. That was merely one branch of the case.

Q. What was the nature of your fishery right on Site Number Two?

A. The nature of it was the purchase from the owner who had it before we had it.

Q. That was a seining right?

A. Fishery right; I could use it for any legal fishing I felt disposed.

Q. A fishery right, you say?

A. A right of fishery. At that time it was held under seining licenses.

Q. And thereupon the only right of fishery would be a seining right, because that would be the only one exercised; therefore it would be the only right he had?

A. That was the only right he had, in just those terms, yes.

Q. If he had any right at all it was a possessory right that was recognized by fair-minded people?

A. Oh, no, it was a legal fishery right he had.

Q. It was a seining right, that is all?

A. He could use it for other purposes.

Q. That is, he could?

A. Mr. Brumbach, yes.

Q. Nobody else could, could they?

A. Nobody could use it for any kind of fishery without his consent.

Q. That is the idea exactly; and thereupon the

(Testimony of H. S. McGowan.)

right, however that he had acquired, if any, was by virtue of employing it as seining grounds? [267]

A. Yes.

Q. And that was a right of fishery that he had, and incident to that he alone could employ it for set nets if he desired. A. Yes, sir, as I understand it.

Q. Stensland got that from the Government, didn't he, subsequently and you acquiesced?

A. No, they got their rights originally by locating.

Q. They subsequently, in 1905, acquired a lease from the Government and continued that same right precisely as Brumbach had continued it?

A. They got a right to use the shore. They did not get a fishery right from the Government.

Q. They did use the shore, continuing any right Brumbach had?

A. No, they did not continue rights on the Brumbach ground proper, excepting part of what is termed the Brumbach ground westerly of the "Great Republic."

Q. They got part of it and leased it to you?

A. They leased a portion of the use of the shore to me.

Q. And you are lawyer enough to know that whenever you accept a lease from a party, you are not in position to deny his title?

A. That is true; I did not deny his title to the use of the shore.

Q. It was his fishery right, wasn't it?

A. No, he had no fishery right on Brumbach ground.

Q. Still, out of the generosity of your heart, you

(Testimony of H. S. McGowan.)

paid him eleven hundred dollars a year for a right that he got for nothing?

A. I did that merely to avoid litigation.

Q. In order to buy your peace? [268]

A. Practically to buy peace.

Q. Nothing else; you paid him that for three years to buy your peace?

A. Practically so; that is about the size of it.

Q. Now since you are frank enough to admit that you put these set nets in there simply as a war measure I presume that you won't contend very seriously that they are of any very large value?

A. I certainly do; I don't say that they were merely and simply a war measure; that is just one branch of it.

Q. But you insist that they are of great value?

A. They are of great value, yes, sir.

(Witness continuing:)

A set net is a long or short dip according to local circumstances. It may be made out of cotton or linen; they are usually made out of linen. I do not know of any instance where a Columbia River gill net was made out of cotton. The size of the set nets and gill nets run from 5½ meshes up to 11. On the lower Columbia River, that is below Cathlamet, I don't know that they use a mesh smaller than six or seven inches; maybe as low as six and a half. The spring fish will run from seven to eleven inches in gill nets. In a general way a set net is constructed like a gill net. They have a line strung with corks known as floats and a lead line on the other side. If you hang

(Testimony of H. S. McGowan.)

a net too taut of course you won't gill your fish. If you hang it loose, it don't make any difference how swift the water is, it will hang loose. In the operation of set nets they are generally fastened at each end. Not necessarily, however, both the cork and lead line, but it must have some weight on each line. In front of Sand Island a good part of the flood tide and a good part of the ebb tide is dead water; dead water probably about half of the time. The current is so slack [269] that it is not difficult to hold against it and there is practically no current there for about half of the time, not enough to interfere with operations. You might operate a set net there all of the time but they would not fish successfully when the current was too strong, simply because as a matter of course when the current is too strong no nets will fish to the best advantage. A gill net will operate successfully in any water, clear, as well as muddy, in the daytime. In the operation of set nets we operate them practically half of the time, that is successfully. You can operate a set net successfully for about twelve hours a day, but a seine only about five hours in twenty-four. Sometimes they are run on a short tide and not be actually fishing more than three hours. Sometimes five or six or seven in twenty-four hours. The average time in which seines can be operated successfully is five to six hours per day. They are working a good deal longer but that is about the time the nets are actually working in the water, while set nets can be successfully worked there twelve hours in each twenty-four.

(Testimony of H. S. McGowan.)

(G. C. FULTON, Counsel for Plaintiff.)

Q. Don't you think you were very foolish and exercised very foolish judgment in operating seines on Site Number Two and the gentlemen who operated seines on Site Number Three exercised very poor business judgment, when he could have got more fish with set nets at one-third the cost?

A. It may have been; I don't know.

Q. During all these years of fishing on Sand Island at a very large expense of seining, they would have done better by using these measly little set nets?

A. I know they could have caught more fish and done a more profitable business by other means than drag seines.

Q. But I am talking about set nets compared with seines.

A. That may be true; it is a matter of opinion.

Q. Did you ever know of operating set nets in the vicinity of [270] where your set nets were proposed to be operated? A. No, I do not.

Q. How many practical fishermen resided in that vicinity and are familiar with Sand Island and its environments?

A. Well, I should think a good percentage of the population in that neighborhood are fishermen of one kind or another.

Q. All of them have had many years of practical experience in the fishing industry?

A. A good many have and some have not.

Q. And no set net has ever been established to your knowledge on the south side of Sand Island?

(Testimony of H. S. McGowan.)

A. I don't know as to that; I haven't become familiar with them there. They use seines and traps and gill nets.

Q. A trap will fish better in clear water than in muddy water? A. Yes.

Q. A seine will fish better in clear water?

A. Generally speaking it will; there are some exceptions.

Q. The reason of that is that the fish can see the lead of the trap and won't go against it but follow it up and get into the pot? A. Yes.

Q. And they can see the seine and will follow it along and ultimately get pocketed?

A. They may or they may fly the seine entirely.

Q. Whereas if it is muddy they will turn and get off? A. They are apt to.

Q. While with the gill net, if it is clear, they will lead right away from it?

A. It depends on the degree of clearness.

Q. Well, if they can see it?

A. It also depends on the local conditions, small breakers and so forth—a gill net may work well in clear water.

Q. The south part of Sand Island has been seined continuously, [271] that is the grounds included within the Sites Numbers Two, Three and Four, by seines for practically ten or fifteen years last past?

A. Yes, I should think they had.

Q. You have been interested yourself down there for pretty nearly twenty years?

A. That is with traps and seines. We did not do

(Testimony of H. S. McGowan.)

any seining until 1902.

Q. And you have made it a point to keep yourself familiar with the fishing industry on the Columbia River naturally? A. Fairly so.

Q. That is your life business, isn't it?

A. Yes, with the exception of when I am tangled up with a boom.

Q. That you say is a side issue? A. Oh, yes.

Q. And you have kept yourself familiar with the different seining outfits along the river, and where they are seining and about how much fish is caught, as nearly as fair business dealing will permit?

A. Well, I generally try to keep up with the current of affairs.

Q. You try to keep up with the procession?

A. Yes.

Q. And you have known naturally how long these grounds covered by these sites I have mentioned have been employed for seining purposes, have you not?

A. In a general way, yes.

Q. For about how long?

A. Site Number Two or the part called the old Brumbach ground has been used since about 1900 or 1901 for seining purposes, and Site Number Three I think perhaps was used a little longer than Site Number Two, but they have not always been used for seining, but partly for traps at one time. [272]

(Witness continuing:)

A good while ago there were one or two traps built in front of Site Number Three. It must have been as far back as 1896, or thereabouts. The principal

(Testimony of H. S. McGowan.)

reason they quit, I think, was because they were harassed a good deal by gill net fishermen and preferred to carry on seining rather than be harassed by gill net fishermen.

A. I mean that there was a lawless bunch of gill netters backed up by certain agitators in the Union and outside of the Union who were against all kinds of fishing on the Columbia River except gill netting, and they were particularly antagonistic to all kinds of fixed gear and particularly traps, and they made it their business to make life a burden to trap fishermen as far as they could and particularly in places that were peculiarly exposed to their incursions, and that locality down there being the best fishery in the lower Columbia, that is that neighborhood, the gill net fishermen naturally congregated there, especially at certain parts of the time, and it was an easy matter for them to make raids on the trap fishermen and raise the dickens with them and they did do it.

Q. You mean they pulled the traps out?

A. No, sir, they used to come in and assault the men on the pile drivers and threaten to hang them. They never pulled any traps out that I know of. They pulled some pile drivers loose at one time and may have cut some off but I don't know of pulling any piles except in this one place.

Q. The space occupied by fish traps, on Site Number Three, is right in the fairway ground to gill netters?

A. No, the gill netters carry on their fishing further off [273] shore. Of course some drop their

(Testimony of H. S. McGowan.)

nets in along the beach sometimes, but the bulk of the fishing is done further off shore.

Q. On this day that you and Mr. Bagnall, assistant to the engineering department of the United States, went down to visit these set nets, the gill netters were outside of their ordinary drift?

A. They were where they usually fish.

Q. And that was so close in you could not see the set nets; you could not get to the set nets?

A. No, the gill netters were out in the stream.

Q. How much did the boat draw?

A. I would say from her looks, 8 or 9 feet of water.

Q. These buoys you say were in 8 or 9 feet?

A. The inner shore buoys were in about 4 or 5 feet, and the off shore buoys were probably in from 8 to 15 feet of water.

Q. And that is at low tide, too?

A. But you know boats are not anxious to ground down there where that swell is and they keep well off shore.

Q. There was 15 feet of water there at low tide and you would not say that a boat that drew only that much would be afraid to go in fifteen feet of water?

A. If all the conditions were favorable, but not down there, because they are not favorable.

Q. But you stated that the boat went away and left on account of the nets closing around?

A. No, I said she went away finally because he ended his view of the situation and the gill nets were drifting in by the tide and congregating thicker

(Testimony of H. S. McGowan.)

around the boat and to avoid being entangled he got out.

Q. So you say now that a trap built in front of Site Number [274] Three, three hundred feet from the shore, would not be in the regular drifting ground used and employed by the gill net fishermen?

A. It would be probably where some drift at times.

Q. I am talking about where they habitually drift, the gill netters.

A. The proper drifting ground is further out, although some drift right in; I have seen them throw their nets onto the beach.

Q. As a matter of fact, when you are seining, you are bothered more or less with gill net fishermen drifting down in front?

A. Oh, yes, it is quite an annoyance frequently.

Q. And these buoys you put out would interfere with the gill net fishermen to a large extent, wouldn't they?

A. If they drifted into them, they might get entangled.

Q. How far were your outside buoys from the shore?

A. Well I could not say exactly, I presume 300 or 400 feet, maybe.

Q. You remember now that you testified that your inside buoys were 50 and 100 feet from shore?

A. That was merely an estimate.

Q. But you say your set net would be only about 100 feet long?

A. Oh, no, probably three to four hundred feet off

(Testimony of H. S. McGowan.)

the beach, the outside buoys.

Q. How long did you propose constructing the set net? A. Probably 50 to 60 fathoms.

Q. That is about 300 or 340 feet?

A. In that neighborhood.

Q. So that if your inside buoy was 100 feet from shore, your outside buoy would be in the neighborhood of 400 feet at least from the shore? [275]

A. That would be about it.

Q. That is about as far out as these traps extended, isn't it?

A. The traps used to go out anywhere from 300 to 500 or 600 feet.

Q. So you would have met with the same trouble had you continued the operation of these set nets that the former gentlemen encountered when they attempted to operate traps?

A. Our gill net friends are a little changed at heart now from what they were in those early days.

Q. That is a fact, is it?

A. It is a fact that they are not so destructive as they used to be.

Q. Is not that because they put the traps out of the way from annoying them?

A. In a certain sense, but not absolutely. They destroyed our traps below Fort Columbia and above Fort Columbia in 1884 and we reconstructed them and used them ever since and they never have destroyed them since.

Q. Now, to be just absolutely honest, don't you know that the reason why the traps have not been

(Testimony of H. S. McGowan.)

built south of Sand Island in front of these sites is simply because the fishermen would not allow them to be there?

A. No, that is not true, but it is true that we fishermen generally feel that the gill net fishermen would annoy them. To what extent, whether to the extent of tearing out the traps, I do not know.

Q. They would assault them and harass them as you have stated to such an extent that they could not maintain the trap there?

A. No, sir, that is not true. They did the same thing in Oklahoma but the fishermen maintained the traps and continued to. [276]

Q. That is the reason that people don't build traps?

A. That is not the only reason.

Q. That is one of the considerations? A. Yes.

Q. Isn't that the best trap ground in Oregon?

A. I guess possibly it is, as good as any. I do not think there are any good trap grounds in Oregon.

Q. Well, you can call them in Washington. As good as any on the Columbia River?

A. Yes, maybe.

Q. Then why don't the people put traps in there?

A. Because they were using it for other means.

Q. Trapping is not half as expensive as seining?

A. Generally speaking it is not.

Q. For what reason do they expend twice as much money fishing by seines when by spending one-half as much they could fish it equally as well with traps?

A. As I said before the troubles with the fishermen was the element in the first instance, and they got in

(Testimony of H. S. McGowan.)

the habit of using seines instead of traps, and it has probably continued, not altogether for the reason that it is more profitable to seine, but it is the system they got into and people are apt to follow a system for a certain time before they change.

Q. Don't you think you would be somewhat annoyed and harassed if you had maintained those buoys out 400 feet? A. That may be.

(Witness continuing:)

The law allows gill netting to begin on the first day of May of each year and generally it does not become profitable for an average fisherman to begin until along late in June, or some time in June. When I operated seines on Site Number Two they [277] varied somewhat in length. We had seines as short as 180 fathoms and some as long as 260 fathoms. I think the seines running from 200 to 210 fathoms were used more than any other seines. The difference in the cost of a seine and a gill net depends upon the size. Take a good, first-class average seine and a good, first-class average gill net, I suppose the seine would be somewhat cheaper. The gill net of standard depth draws 25 or 26 feet of water. Everything brand new would cost, I suppose, about seventy-five cents a fathom, and a seine of similar depth would probably cost—well, I don't think there would be much difference. In order to have operated these set nets of mine I think it would take about eight men.

I think it would take eight men to operate the nets themselves. I think it would average about a net to a man, by operating them altogether it would take

(Testimony of H. S. McGowan.)

about a man to a net. One man alone could not operate one single net by himself with as good advantage as two men with two nets contiguous. But I think it would require eight men to handle these eight set nets. In addition to that you would have to have nets and gears and boats, and you would probably have to have a small launch to make it convenient and profitable. The object of that would be that you cannot have eight men all working at one job in the most economical way and have them away from home where they would have to come miles and miles to get supplies, and the kind you get that they would constantly use to prepare fish for market. This also, of course, applies to seining as well as gill netting. When we operated seines on those grounds we did not use a launch, the only launch was the cannery launch that took the fish away and brought our supplies. They came on the regular cannery company launch and the outfit had two wagons part of the time and horses that they used for seining. You can operate two seines, one 1,200 feet long by employing seventeen men at \$70 a day, or around that sum. I [278] do not think you could employ eight men for \$30 a day. I said eight men were the only expense and figuring a launch with one extra man figured at \$6 a day. I made the contract with eight men for the season. We would get our provisions from the cannery. Generally speaking, it would cost about \$80 a day to operate two seines 1,200 feet long on Sand Island, and would cost about that in 1905, '6 and '7.

Mr. FULTON.—Q. When you obtained these Ore-

(Testimony of H. S. McGowan.)

gon set net licenses, did you post any notice on the bank or shore of Sand Island? A. No, sir.

Q. Did you post the number of either of those licenses on the shore? A. No, sir.

Q. You did nothing under those licenses whatever excepting to hold them?

A. The only thing I did was to make the preparations to put licenses out on the location ground, and then the injunction came out and I quit.

Q. You intended to put them on the ground?

A. I intended to establish them out there, providing it was necessary to protect my rights.

Q. You intended to put the number on the ground?

A. I would if I found it was necessary.

Q. You had not yet found it so? A. No.

(Witness continuing:)

The only notice I gave or the notice as posted were the numbers of our Washington licenses on the buoys, and also on the bank, accordingly as I have heretofore testified. I do not recollect whether I put the Washington license numbers up before or after I knew who was the successful bidder for these sites. [279] But I apprehend it was very shortly after the issuance of the licenses, April 1, 1908. I would probably receive these licenses a couple of days after they were dated and would require a day or so to put up the notices. I presume several days at least might have elapsed after the date of the licenses until I put up the notices; that is, the Washington notices. My recollection is I posted the notices as

(Testimony of H. S. McGowan.)

promptly as possible after I received them, and in the same manner as I had previously done.

**[Testimony of G. B. Hegardt, for Defendants
(Recalled).]**

G. B. HEGARDT, being again recalled by counsel for defendants, testified in response to interrogatories propounded by counsel for defendants as follows:

(Interrogated by Mr. DORR:)

The Oklahoma channel referred to in the testimony herein runs in the north and west direction and follows the Republic spit on the west side of Sand Island and the southwest corner of Sand Island. Republic spit is shown on this chart, Defendants' Exhibit 5, as being attached to Sand Island. That portion of the channel that laid between Republic spit and Sand Island proper was what has been referred to as Oklahoma and Oklahoma channel. That channel is not there now; it has shoaled up, filled in. Referring to Defendants' Exhibit 5, a chart upon which I have delineated certain lines, these soundings were taken in 1896 and [280] covers practically the territory north of Sand Island lying between Sand Island and the Washington shore; that covers a large expanse of flats and that portion of this chart referred to in the footnotes as being from the survey of the United States Engineers, 1907, covers only the bar proper, the territory lying between the Oregon shore and Sand Island and continued up to Sand Island as far as Fort Stevens. In the footnote it says: "Topography executed between 1868 and 1892,

(Testimony of G. B. Hegardt.)

and hydrography between 1868 and 1899." That means the general survey of this chart was made in 1868 from the Pacific Ocean, taking in the Lewis & Clark River and the Columbia River estuary on the Washington side to Knappton. The process is that the United States Coast Geodetic Survey corrects all information received and puts on the date when received. Since 1868 no survey has been made of the Lewis & Clark River or Youngs River or Youngs Bay. The soundings taken in Bakers Bay were on the survey in 1896, and this footnote states that the "Hydrography was executed between 1868 and 1899." The 1899 soundings were taken from Astoria and east in connection with the bounds of the river above Astoria, but the main channel from Fort Stevens west and out to the Pacific Ocean were taken in 1907, and no survey was made of Bakers Bay since 1896; so that the soundings and depth of water represented on the map in Bakers Bay are of 1896. But generally what we call the annual bar survey only covers territory from Fort Stevens and west to the Pacific Ocean. The first and immediate effect of the jetty on the water at the bar was to sweep away what is called the middle sands located at the mouth of the river which divided the entrance to the river into two channels, north and south, and one channel was formed which has ever since remained. The middle sands at the time the construction of the jetty began was about eight or nine feet at low water. These sands have been swept away and the depth of water at that point is now from 24 to 35 to 40 feet deep.

(Testimony of G. B. Hegardt.)

This map, Defendants' Exhibit 5, does [281] not delineate Sand Island as existing from an actual survey made in 1896. The custom has been to make a complete survey of Sand Island for every annual report and survey, while the territory of Bakers Bay has not been sounded. That was to keep track of the movement of Sand Island and also for the purpose of checking the cross-sections of the river between Sand Island and the jetty. So that Sand Island has always been surveyed every year for that purpose. These dotted lines surrounding Sand Island represent the limiting lines by the engineers in the early nineties; that provided a clear way or passage in which no traps or gear could be constructed. They could not be constructed within the limiting lines; that is between the limiting lines or channel lines that defines the channel. I refer to those lines in Bakers' Bay and those lines were established for the purpose of providing an unobstructed channel from the Columbia River at the head of Sand Island and Ilwaco and Fort Canby, and between those limiting lines defining the channel no obstruction could be placed. That is, no obstruction could be placed outside of those dotted lines surrounding Sand Island.

Sand Island is delineated on this map, Defendants' Exhibit 5, according to a survey thereof made in 1907. The blue line marked "boundary line as claimed by the State of Oregon" as delineated on this map was taken from the map put in evidence by the State of Oregon in the suit brought by the State of Washington against the State of Oregon to establish the

(Testimony of G. B. Hegardt.)

boundary line between the two States in that vicinity.

Redirect Examination.

Q. These section lines extending over this territory cover Sand Island and the main channel (Defendants' Exhibit 5) I understand have simply been placed on this plat. They do not represent actual land surveys? [282]

A. No. There was no survey covering Sand Island.

[Testimony of J. P. Coyle, for Defendants.]

J. P. COYLE, a witness called on behalf of the defendants, after being first duly sworn, testified in response to interrogatories propounded to him by counsel for defendants, as follows:

(Interrogated by Mr. DORR:)

My name is J. P. Coyle. I am one of the defendants in this action. I reside at McGowan, Washington, and have lived there about fourteen years. I am the same J. P. Coyle who held the three fishing licenses for set nets issued by the State of Washington on or about April 15, 1908, which were referred to by Mr. McGowan in his evidence. I am a fisherman by occupation and have followed that calling for about twenty-three years on the Columbia River. I have been engaged in trap fishing and seining for salmon fish on the lower Columbia River. I know the territory or character of the land commonly called Sand Island, and have been acquainted with it since 1903. I fished there in 1903; I never knew the island before that and had never seen it. In 1903 I seined

(Testimony of J. P. Coyle.)

for a seining outfit by the name of Goodnough & Lindberg. I know in a general way the location of the so-called sites numbered two and three on the south side of Sand Island and know where the boundary lines are on the ground.

Q. What did you do if anything towards making locations under the three set net licenses which you held in 1908? A. I put down anchors and buoys.

Q. Whereabouts?

A. I put down the inner anchor about five feet from the shore line at low water.

Q. Above or below?

A. Below; out towards south channel and made it fast with lock and chain and wire cable; a wooden buoy with a number [283] attached, one for each set net, one inside and one outside.

Q. How many to each location?

A. Two buoys to each location.

Q. One on either side? A. One on either side.

Q. Where was the outer end of each location with respect to the shore line, further in or further out?

A. It was three hundred or thereabouts from the inner buoy out south.

Q. How were these buoys marked, if at all?

A. Marked with large letters on a wooden board, with a light or white background, and black letters.

Q. What were the letters?

A. They were numbers, about six or seven inches long.

Q. What were the numbers; what did they repre-

(Testimony of J. P. Coyle.)

sent? A. They represent the location for a set net.

Q. What connection if any did the number of the licenses have with the number of your buoys?

A. You had to put your number on the buoy in order to establish that you intended that for a set net location.

Q. Did you put the same number that your licenses carried on your board? A. Yes.

Q. How many locations did you so establish or locate? A. Three.

Q. Who was out there with you at this time if anyone? A. Mr. Lindstrom and Mr. McGowan.

Q. Mr. Lindstrom is the other defendant?

A. Yes, he and I placed the anchors.

Q. Henry McGowan, likewise the defendant in this suit? A. Yes, sir.

Q. You were all there together; do you remember the day? [284] A. I think it was in June.

Q. You don't remember the exact day of the month? A. I think about the middle of the month.

Q. How soon after you obtained the licenses was it?

A. We obtained the licenses on the 15th and it was right after. Not immediately after. By the time we made our anchors and cables which took us several days; maybe a week.

Q. How much of a task was it to prepare these anchors and cables and buoys?

A. It was quite a little task. We had to drill a hole through the rock, which weighed three hundred pounds, something that could not be dragged away

(Testimony of J. P. Coyle.)

easily, something to establish an anchorage. We drilled holes through and put the chain through the rock and then back up around to the other part of the chain, with a clamp. Wire was connected to it and made quite tight. We had three rocks for each location.

Q. Do you know what those anchors were reasonably worth?

A. I don't know; it took quite a little to drill them.

Q. Where did you get the rocks?

A. We got them on the beach in front of the cannery, from the jetty.

Q. Did you find them on Sand Island?

A. No; in front of McGowan's cannery on the mainland of the Washington shore.

Q. And took them out how?

A. In a boat and took them down to the location in front of Sand Island and placed them.

Q. How much labor would be necessarily expended on each of them? [285]

A. They must have cost us, wire cables and all, about fifty dollars, with the labor.

Q. How many of the anchors did you all three take out?

A. We took enough for the eight locations.

Q. That would be 16? A. Sixteen.

Q. Were they all placed there? A. Yes, sir.

Q. Were they all placed on the same day?

A. All placed on the same day.

Q. And you had three? A. I had three.

(Testimony of J. P. Coyle.)

Q. How many did Mr. Lindstrom have?

A. Three.

Q. And Mr. McGowan? A. Two.

Q. Were they all below the line of low tide?

A. All below the line of low tide.

Q. Did you actually fish those locations?

A. No, we hired men to fish them. We were making preparations to fish them with nets. We had two men to start operations.

Q. Where were these men?

A. They fished along there, yes, at the location grounds of the set nets.

Q. Did you actually put in your nets and fish the locations in 1908? A. Yes, we started the nets.

Q. Had you actually got your nets on the ground?

A. We got in one net.

Q. Why did you quit?

A. We were stopped by the injunction.

Q. In this suit? [286] A. In this suit.

Q. Did you have any other reasons for stopping?

A. No.

Q. After these buoys were anchored out, did they remain there?

A. No, I understood they were removed once or twice; we replaced them twice and some of them were replaced a third time. I don't know just how many.

Q. Did you know personally who took them out?

A. No, not personally.

Q. How many years had you been acquainted with that fish place before 1908? A. Since 1903.

Q. Had you fished there?

(Testimony of J. P. Coyle.)

A. Yes, sir, I seined there in 1903.

Q. And each year since?

A. No; I have fished there some years but the last few years I have not.

Q. Did you ever do anything yourself towards clearing that ground?

A. I cleared that ground when Mr. Brumbach owned it once. I did it for him.

Q. What year was that?

A. It must have been 1900 I think when Brumbach,—or it might have been 1899.

(Witness continuing:)

In 1900 or 1899 Brumbach occupied that territory seining for salmon. After that he sold out to McGowan, and I cleared part of the trap location for P. J. McGowan and Sons. There were piles in there which obstructed our seines and I cleared them out. I know of two fish traps being operated on that ground. I operated one of them. The reason I quit was that the sand filled [287] on that point and closed those traps on the island. Afterward the channel washed away and those pile stumps were exposed as the island went north so that they were an obstruction to seining. One of these traps I think was operated two seasons, the upper one, that is the easterly one, and the other one was operated three years to my knowledge. I don't know how long before that time. A salmon trap is constructed by driving piles in the bottom of the river, the lead is drove straight out according to your current, and then there is what you call the heart, the row of piles

(Testimony of J. P. Coyle.)

in a heart shape, which is supposed to hold the fish and corral them. The heart is at the outside end of your lead, or if it is a double trap there is one lead on each end, and the pond or pot as they call it, is drove outside of the heart. In the Columbia River traps the pot is drove on the upper side of the heart and at the entrance of the heart into the pot; the heart connects with the pot by web and there is a gate in the lead from both sides and the web connects there leaving a space of eight feet on each side. The cotton web is put on these piles. The pot has two spaces which are called gates to let the fish in and that is made out of cotton web. The fish go into the lead, then through the gate into the heart. The heart is so constructed that it will lead the fish up to the entrance and into the pot. The piles are driven on the slant of the current to lead them into the pot. The traps are of different length, some from 300 feet to six or seven hundred feet long. I have been referring to the Columbia River.

I think I know what it would reasonably and probably cost to operate these set net locations, which I have testified to, per season. We had an arrangement to operate them together. We each had our own locations. It would take two men to operate two locations as they should be worked, and a man would cost \$3 a day, and it would take eight men to operate the eight locations [288] and somebody to take care of them at night and watch them; then you would have to have four boats, small boats, to operate eight nets, and two boats at least to take care of your

(Testimony of J. P. Coyle.)

fish, with the assistance of a launch to handle the fish and bring them to the station and so forth, or take your nets to the rack for repairs, and carry the men to and from their work. You should have two nets for each location because you cannot keep a net in the water all of the time. They get more or less broken and have to be repaired and while one is being repaired you could use the other. You would have to have about sixteen nets to operate successfully and to put these nets in would cost in the neighborhood of \$500, if not more, and this would be the cost for the entire sixteen nets. That means, of course, that the net should be fully equipped with cork and lead lines; then your labor, eight men at \$3 a day for about two months; three dollars a day and they board themselves. I figure that the actual cost of these nets and to operate them those two months would cost about \$3,000. That is taking the fishing season for one year. The fishing season opens on the first of May but the net locations are not profitable to fish before the last of June or the first of July. The fishing season closes on the 25th day of August. I had intended in good faith to operate these locations in 1908, and was making all due and reasonable preparations to that end. I think I know the market price of fish in 1908. I think small salmon was five cents and large six cents in 1907. That is five cents a pound for cannery salmon and six cents a pound for larger salmon delivered at the station, that is at the cannery station. In some instances cannery launches would come and take the fish from the grounds, they gen-

(Testimony of J. P. Coyle.)

erally did that at the seining grounds, and you generally have gathering stations on your own grounds, and the prices I have just quoted is the price of fish on the grounds. [289]

Q. Judging from your knowledge of the run of fish at this location in June are you able to state what the reasonable amount of the catch would have been in tons per year per season in 1908, 1909, 1910?

To this question counsel for the plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial, and that the witness was not competent.

A. These eight nets, according to my opinion, if successfully operated, would get over one hundred tons of fish for the season, and that would be true for each of the said three years, and I believe according to the fish caught there the last two years it would be more. The character of fish caught on these grounds during said time were Chinook and steelheads. Chinook is supposed to be the best fish in the river. Steelheads are not so high priced as Chinook, it is more of a cold storage fish. The Royal Chinook commands the highest price. There is no salmon which commands a higher price than the Chinook. The prices that I have given is the average of all the fish marketed down there. During the years 1908 and 1909 the price was higher. Cannery salmon were six cents in 1909 and larger salmon were seven cents, that is salmon over twenty-five pounds. In 1910 small salmon, if I remember right, was six cents and large salmon seven and a half cents, and in some cases

(Testimony of J. P. Coyle.)

they paid eight cents.

The expense of operating, in my judgment, would not have varied materially during these years. The expense of operating would be about the same each year.

Q. The only difference then in the situation would have been a higher price for fish during the years succeeding 1908?

A. Yes. The same price for operating but a higher price for fish. [290]

Cross-examination.

(Interrogated by G. C. FULTON.)

I am working for P. J. McGowan and Sons and have been working for them for about fifteen years on a salary. I am employed the year round. I was working for P. J. McGowan in 1908 on a salary. I made sixteen of these buoys and they cost altogether \$50. I did not pay for them; my labor went into them, and that is all it cost me. I was paid by Mr. McGowan my regular salary during the time I was employed in making them. I made all of these buoys in the daytime, and at that time I was drawing my regular salary.

Q. What do you mean then by paying for them with your labor when McGowan was paying you by the month?

A. I mean this way, that I have shared in the expense of that location and have done so. I have never paid anything yet. Mr. McGowan has never furnished me a bill of the costs, and I have never asked him for a bill.

(Testimony of J. P. Coyle.)

The defendant Lindstrom is also a fisherman and he also worked for P. J. McGowan and Sons. I don't know whether for a salary, wages, or how.

Mr. McGowan first suggested putting out these set nets on these grounds. He told me that set nets could be operated at Sand Island. He did not come to me and say that we could get them, but that there was a show for set nets on Sand Island. I said if there was a show for anything like that I wanted to take one. I said I would take one or take what I could legally fish. Mr. McGowan did not tell me that he wanted to fight the Columbia River Packers' Association. It was this way, the two States were having trouble and there was a chance for set nets in front of Sand Island; a chance to get a fishing ground and make something. I did not understand I was to cork anybody, and I supposed I had [291] a right to fish on the river. At the time I knew there was a seining party had a license on the south shore of Sand Island from the Government.

Q. And you knew that by putting these set nets in there where it was proposed to put them, that it would cork these seining rights on Sand Island?

A. One is on the shore— (Interrupted.)

Q. Answer the question.

A. That it would cork them you say?

(Question read.)

Q. Did you ask him who it was proposed to cork?

A. No.

Q. Did you say anything to Mr. McGowan as to

(Testimony of J. P. Coyle.)

where or whose seining rights it was proposed to cork? A. No.

Q. Did he tell you whose seining rights it was proposed to cork? A. No, sir.

Q. Didn't you know it would involve you in litigation or a lawsuit? A. It might.

Q. You thought that did you; did you say anything to McGowan about it? A. No.

Q. Was there anything said there about putting in these set nets when Mr. McGowan first spoke to you? A. No.

Q. Only what you have stated? A. No.

Q. That was all that was said? A. Yes.

Q. Did you know what grounds, or in front of what grounds, it [292] was proposed to put these set nets? A. I know my ground.

Q. At the time Mr. McGowan spoke to you first, did you understand in front of whose grounds or seining right it was proposed to put these set nets?

A. I don't know of any seining right. I know I was going to get a set net license in front of Sand Island.

Q. And you knew Sand Island had been rented by the Government to different parties for seining purposes?

A. They had begun to for the last few years.

Q. And you knew that the Government had executed leases for seining rights in front of Sand Island? A. For a few years, yes.

Q. You knew that at the time Mr. McGowan came to you, that the entire frontage of Sand Island had

(Testimony of J. P. Coyle.)

been leased for seining purposes? A. Yes.

Mr. DORR.—I object to this as being incompetent, and not in harmony with the lease introduced by the plaintiff. No evidence in this case that the Government ever leased anything below the line of low tide.

Q. Knowing that these rights had been leased and that you proposed to put these nets in front of these leased rights, you tell the Court you had no curiosity as to who the individual was that you proposed to cork? A. No; I had none.

Q. You had no curiosity whatever?

A. I want to state that I had a right to fish the Columbia River with set nets as long as I did not touch their land, and I still think I have that right.

Q. So you didn't bother as to whether it was some personal friend or some enemy? [293]

A. No, I supposed I was holding my rights.

Q. Did it make any difference if some personal friend of yours had obtained the lease from the Government, you proposed to put your set nets in front of his ground regardless of whether he was a friend of yours or whether you were corking him or not?

A. I have the right.

Q. You were perfectly willing to do that?

A. Yes.

Q. You didn't take into consideration who the party was?

A. It made no difference; it was a business proposition.

Q. You did not know it was in front of the Columbia River Packers' Association? A. No, sir.

(Testimony of J. P. Coyle.)

Q. You knew of course that you might get into a lawsuit in case you did that?

A. I did not know but I might.

Q. You thought so and figured if you did you might get into a lawsuit? A. It might be; I don't know.

Q. But you didn't say anything to McGowan about that?

A. No, I did not. I thought I had the right.

Q. Why didn't you, while Mr. McGowan was fishing these grounds, why didn't you put set nets in front of his place, since you knew you had the right?

A. The idea came to me on account of this trouble with the two States.

Q. When McGowan was there, the trouble was on?

A. I don't know about that.

Q. You don't wish to be understood that simply because there was trouble between the two States, the law would be different? [294]

A. There might be difference in the waters and the channel.

Q. That is, you would have to cork anyone fishing in Oregon but not in Washington?

A. The boundary might throw the piece of land in this State, that used to be in that State, and would change the fishery so that a man might hold it.

Q. In other words you wanted to steal it?

A. No.

Q. If held to be in Washington, it would still belong to the man who fished it?

A. I don't know; it don't look that way to me.

Q. Suppose it had been in Oregon; would it still

(Testimony of J. P. Coyle.)

belong to the man who fished it?

A. I don't see it that way.

Q. You knew they had been fishing there right along? A. Yes.

Q. And claimed to have the right? A. Yes.

Q. And by putting your set nets there you were stealing it?

A. No; I was simply exercising my rights as a set net location. The State allows me a license and I am not stealing when I fish.

Q. As I understand your position, you claimed at that time under the laws of Washington, if one was fishing a seining ground and had his notices up you had a right to go out in front of him in his ground, and put down set nets and maintain them?

A. I had a right to put down set nets wherever I got a location.

Q. That is not the answer.

A. Sand Island did not belong to anybody. It is a different proposition. You buy the seining ground from the Government [295] but Sand Island don't belong to anybody. I have a right to set nets there as well as any seiner.

Q. Why didn't you exercise that right before?

A. When the trouble came up about the two States, if I had a set net location and fished it, I had a chance to own it.

Q. Why did you confine it simply to the front of Sites Two and Three?

A. I confined it to that place where I picked out for my advantage.

(Testimony of J. P. Coyle.)

Q. If it was such a good proposition, why didn't you extend it along the entire front?

A. I had all I could handle then.

Q. Did you pay Mr. McGowan or anybody else for the employment of these two men?

A. I guess Mr. McGowan paid him; I contributed my labor.

Q. Now did you pay? A. No, I did not.

Q. Was any bill rendered to you for it?

A. Not yet; it is not settled yet.

Q. Did you order personally any nets to fish your three seines?

A. No. Mr. Lindstrom and I ordered the depth and length that we were supposed to fish.

Q. Did you order the nets?

A. We gave the order to the company.

Q. Did you order them?

A. I ordered the company to put what kind of nets.

Q. Did you sign the orders? A. No.

Q. Did the company charge you with this net?

A. The company were charged I guess.

Q. You were expected to pay it?

A. Our expense. [296]

Q. You would have been expected to pay for the nets if the company furnished them? A. Yes.

Q. And you understand that the company was to order the nets and charge you with the expense of the nets?

A. That is the habit with the cannery along the Columbia River.

Q. That was your understanding? A. Yes, sir.

(Testimony of J. P. Coyle.)

Q. And thus far you have not been furnished with any expense account whatever?

A. We have had the expense of these buoys and making the preparations of those nets.

Q. You have been charged with it?

A. It is not settled yet.

Q. Who paid your expense up here as a witness?

A. I did myself.

Q. Did Mr. McGowan furnish you any money for that?

A. Anything he furnishes me is charged up to my account. He did not furnish any.

Q. Did he agree to? A. No.

Q. Did he say anything about it?

A. No. My expenses go to the company when I work for them, and when I leave them I pay my own expenses.

Q. Do you expect McGowan to pay your expense?

A. P. J. McGowan to pay my expense when I am in their employ.

Q. You expect them to pay your expense up here as a witness in this case? A. No, I do not.

Q. Why not?

A. Because I have this license in my own name.

[297]

Q. You expect to pay all of your expense up here and back and not to make any claim to P. J. McGowan & Sons?

A. My expenses will come out of these set nets when that question is settled.

Q. Suppose it is settled against you?

(Testimony of J. P. Coyle.)

A. If it is, then I guess that is my loss.

Q. You don't expect McGowan and Sons to pay you anything for your expenses up here?

A. I don't know whether they will or not.

Q. What is your anticipation about that?

A. I don't know.

Q. You rather think they will not?

A. They may or may not; I have not asked them that question. The question was never put to me.

Q. By the way, these nets you ordered for those set nets, were how long?

(Witness continuing:)

The set nets which were ordered would hang about 300 feet in length and would weigh in the neighborhood of 120 pounds when dry. They were about 24 feet in depth. I have made set nets and put the lead on about every 14 inches according to the current. Each piece of lead would weigh about three ounces; I don't know exactly. I think that if the net was wet it would weigh, cork and lead lines together, about 300 pounds. I did not see any set net fishing south of Sand Island. I was not there. I did not know whether they got any fish or not. I started to operate in the middle of June and had, as I understand, about five days of fishing, but I do not know whether any fish were caught or not. I was not sufficiently interested in fishing there to inform myself whether or not my set net was fished or whether it caught any fish.

Q. How did you propose to anchor the lower end of your set net, these lead lines? [298]

(Testimony of J. P. Coyle.)

A. We fastened them to the wire cable.

Q. At the top? A. No, at the bottom.

Q. How would you get down there?

A. Raise your anchor.

Q. Your idea was to raise the anchor and tie the lead line to the anchor? A. Yes.

Q. Not to the wire cable?

A. To the wire cable at the anchor.

Q. To operate the set net, you would have to anchor the lead line at the bottom of the river?

A. Yes.

Q. And the cork line on the surface of the water?

A. The cork line don't have to be made fast on top, as long as your lead line is fast.

Q. You think that an anchor weighing 300 pounds would hold a net weighing 300 pounds.

A. The anchors would be 600 pounds, one on each end, and you must remember your set nets, when you put them down, you rock them down when there is a strong current. The little lead line *line* you have on the gill net will not hold the set net; you must put rocks to hold them in position, because it has to be stationary. For the set nets you must put the rocks.

Q. Heavy rocks?

A. Well, small rocks, 4 or 5 pounds weight, like a trap.

Q. How many?

A. According to your current.

Q. You know there is a very swift current by there?

(Testimony of J. P. Coyle.)

A. Only for about two hours, in the first of the ebb; that is the only time it is swift. [299]

Q. Did you provide for rocks to anchor at the bottom?

A. We did not get a chance to get to that part.

Q. You had several days, didn't you? A. No.

Q. You insisted on putting these anchors back in there?

A. We had to put them in to hold our location in order to get ready.

Q. You had found them to operate?

A. We did not figure on operating until the 1st of July, or the last of June.

Q. So you got no rock to make the anchors?

A. We had rocks handy.

Q. But you did not need them?

A. No, we were getting it.

Q. But did you get it? A. Not on hand.

Q. Did you ever operate a set net in front of Sand Island? A. No.

Q. Did you ever know of anyone operating any there? A. No.

Q. You don't know whether it is practical or not?

A. I think, in my opinion, it is.

Q. But you don't know.

A. I never got a chance to try.

Q. And therefore you don't know; you are only guessing?

A. I don't see why it is not as good a fishing place as any.

Q. Then if that is true, and you knew you could

(Testimony of J. P. Coyle.)

catch eight tons of fish with these three nets all these years, why didn't you put them in before and get the money? A. I didn't know it.

Q. And not work for wages all your life?

A. I didn't know it then; didn't think of it. [300]

Q. Mr. McGowan was the man who suggested it?

A. Lots of men don't think of such things.

Q. You were familiar with the ground out there and knew nobody had any rights out there; it was everybody's territory?

A. It was, and still is, I think.

Q. Why was it that it happened to be in front of Sites numbered Two and Three that these set nets were placed?

A. That is the best set net ground; we did not want to put them in a poor location.

Q. In front of which site did you put your three set nets? A. In front of Site Number Three.

Q. You heard Mr. McGowan say that he thought the best were in front of Sites Two?

A. I guess it is; I won't dispute his word on that.

Q. So, as a matter of fact you did not get the best set net location?

A. No, but I got the next best I could, though.

Q. Now, these set nets are only three hundred feet long? A. Well, they may be more.

Q. You put in the order?

A. About 300. They might run 350.

Q. You have an order for the nets you said; how long were they? A. Well, say 300 feet.

Q. What do you say?

(Testimony of J. P. Coyle.)

A. I will say 300 to settle the account.

Q. You estimate that these nets 300 feet long, your three nets, would catch as many fish as two seines that were 1,250 feet long, operated at the same place; that is your estimate, is it?

A. I don't know about that; I know what I estimate the set nets would catch if properly worked.

Q. About 300 tons? A. Yes. [301]

Q. And the seines they tell me only caught about 80 tons, as testified to by Mr. McGowan, and they were about 1,250 feet long. Explain why you think that the three set nets only 300 feet long, to be tied down stationary, and the only way to catch fish would be to gill them, would catch 100 tons, whereas the seining operation which cost about one hundred dollars a day to operate, only caught about 80 tons.

A. You misunderstand me. I mean on the eight locations. I don't mean just the three.

Q. Well, about how many tons of fish did you estimate your three set net locations would catch?

A. My three ought to get about thirty tons of that.

Q. Where did you ever operate set nets?

A. North River.

Q. That is a little bit of a tidal stream?

A. Well, you can't jump over it.

Q. How wide?

A. It is about 400 feet across the stream.

Q. How long was the net you operated?

A. Oh, about 100 feet.

Q. And how many tons did you catch there in the season? A. I don't know; I did not weigh them.

(Testimony of J. P. Coyle.)

Q. What made you quit?

A. I was fishing it for P. J. McGowan in the North River. We used it in our trapping.

Q. How long did you operate it?

A. I operated it one fall.

Q. Did you ever operate a set net at any other time? A. No.

Q. Your only experience was in North River, which is nothing more nor less than a slough? [302]

A. No, it is not a slough.

Q. You swear it is not?

A. It is a river, navigable.

Q. Is it navigable beyond tide water? A. No.

Q. You can jump across it above tide water?

A. Yes, but those set nets were not above tide water.

Q. It is just what you call a tidal slough?

A. Well, you can't walk across it.

Q. But when the tide is out, you have no water there?

A. Oh, yes, there is water there.

Q. How much?

A. Right at that location there is about eight feet of water.

Q. But it is not navigable at low tide?

A. They come to that location.

Q. But I am talking about the river; you cannot navigate the North River at low tide?

A. You can go past this location.

Q. In what kind of a boat? A. Fish launches.

Q. I am talking about zero tide, low water; will

(Testimony of J. P. Coyle.)

you swear that North River is navigable from its mouth up to where you say your fish trap was located?

A. Yes, a fish launch can go up to that set net at low water. Those fish launches go there. It is in the entrance to North River a little ways in.

Q. The North River runs through the tide lands?

A. Yes.

Q. And its head is a small stream called North River, which you can jump across?

A. You never could jump across it as far as I know.

Q. You mean the river beyond the tide land?

[303] A. No, you cannot.

Q. Well, it is not over six inches deep?

A. Yes, it is.

Q. It is a small mountain stream.

A. It is a small mountain stream, but deeper than that.

Q. How wide is it above tide water?

A. As far as I have been, it is say all the way from 50 to 100 feet,—50 feet is the narrowest that I have been up.

Q. How far were you up? A. Two miles.

Q. What is the average depth?

A. I did not sound it.

Q. But you could see it?

A. I could see with my eyes.

Q. It is just *line* one of these average streams, about fifty feet wide?

A. Fifty or one hundred feet.

(Testimony of J. P. Coyle.)

Q. It is just like one of those mountain streams and leads into the tide land? A. Yes.

Q. And then you come to this broad, wide, deep place, and you operated a set net one fall in this North River; that is the only experience you had in operating set nets? A. Yes, sir.

Q. What makes you think that you could catch about thirty tons with these three nets?

A. A fisherman understands his business and ought to know.

Q. But your experience is only limited to one fall fishing on North River?

A. I fished 20 years on the Columbia River, but only one fall with set net and traps is where I had experience with all kinds of gear. [304]

Q. You operated a set net one fall season on the North River?

A. A fisherman doesn't have to have ten years' experience; one is sufficient.

Q. And that is the reason you could probably catch 30 tons with your set nets, based upon your experience as a fisherman one fall fishing on the North River, when you don't know how many fish you caught?

A. I could not keep count; I was working for wages; but I delivered the fish, that was all there was to it.

Q. As a matter of fact, those nets which you claimed you were getting ready to order for these three alleged sites that you took up in front of Site Number Three, never were ordered and never came?

(Testimony of J. P. Coyle.)

A. They never came; I don't know; we had the web there at the cannery.

Q. They always kept sufficient quantity?

A. Some kinds.

Q. But they were never manufactured?

A. They were never completed, you mean?

Q. Were they ever started? A. Yes, sir.

Q. Who started them?

A. That gentleman there, Mr. Lindstrom.

Q. He started them? A. Yes.

Q. How much work did he do on them?

A. He worked,—I don't know how much. I know he started to get the web ready to hang.

Q. Do you know whether he started to hang it?

A. I don't know.

Q. The web was already made?

A. Well, yes, but you must make the nets. [305]

Q. What did he do?

A. I guess he cut the web to suit the water.

Q. Had he hung the lines?

A. Not that I know of.

Q. Did you pay him for the work?

A. I did not.

Q. Did he put in a bill to you for it? A. No.

(Witness continuing:)

A. I did not say that I owned a fish-trap on Sand Island. The fish-trap that I referred to belonged to P. J. McGowan and it was in Oklahoma channel. It was not in front of Site Number One, but was in front of Site Number Two. I know this trap location was in Site Number Two. There was no such

(Testimony of J. P. Coyle.)

thing as sites then. At the time this trap was operated the channel was no further east than it is now. There was a channel in there between the "Republic" wreck and Sand Island and this trap was in this channel. It was southwest of Sand Island. It was west of the south point of the island and the island has since made out, bringing the trap in front of Site Number Two.

It would require eight men to operate eight set nets and one man to watch; that would be nine men at \$3 a day, which would be \$27 a day to operate. In addition to this you would have to employ a launch at a cost of six or seven and a half dollars. It would cost something to keep the nets in repair, but a very small amount.

Q. Is there a set net in the lower Columbia River in front of any sand island in the river?

A. I don't know; I am not familiar with all the river.

Q. But the portion of the river that you are familiar with, is there or was there operated during the year 1908 and [306] 1909 and '10, one single set net in the channel of the Columbia River near any sand island that you ever heard of or know of?

A. Well, no.

Q. So that you don't know whether it is a practical experiment or not, but simply you are theorizing on it?

A. I know it is very successful in places.

Q. But is it in the Columbia River channel a success? A. Yes.

(Testimony of J. P. Coyle.)

Q. Where? A. Up the river.

Q. I am talking about the lower Columbia River?

A. I don't know.

(Witness continuing:)

The reason we did not begin operating these set nets until the latter part of June or the first of July was that fish don't generally come along the shore there early. It was not profitable and there was more or less drift in the early part of the season. That was the only reason. I only fished there one season, 1904. The only experience I have had with Sand Island was during the year of 1903 and 1904.

Q. Don't you know as a matter of fact, Mr. Coyle, that you cannot possibly maintain a set net at that place; that the gill net fishermen's seines would entangle it and take it out?

A. You could maintain it all right; the only trouble would be the gill net men interfering.

Q. Four hundred feet out from the shore would be right in front of the innumerable gill nets that come down that channel.

A. We have the same trouble that the seines have.
[307]

Q. But they have to pull their seines in?

A. Certainly.

Q. But you cannot pull in your set nets?

A. No.

Q. So that when these gill nets come down it would just simply take out your set net anchor, wouldn't it? A. No, it would destroy their net.

Q. And about that time there would be twenty fishermen on top of you, and your anchors would not

(Testimony of J. P. Coyle.)

last long? A. They might or might not.

Q. What is your judgment about that?

A. Well, I don't know. The fishermen are not as bad as they used to be. They are more friendly than they used to be.

Q. One of their nets costs about how much?

A. Something like two hundred dollars.

Q. They cost five and six hundred dollars, don't they, a good gill net, and by the time your obstruction cut one in two, what do you think the consequences would be?

A. I don't know; I suppose there would be trouble, as there has been before.

Redirect Examination.

(Interrogated by Mr. DORR.)

When I spoke about working in 1903 and 1904 I intended to say and meant to say 1893, and this refers to all of my testimony where I have used those dates. At the time I applied for my set net license, in June, 1908, and when I located my anchors and buoys at the places mentioned, I did not know and I had no idea that anyone had a lease from the Government or anybody else on the ground upon which I located, and when I said that I had heard that they had a lease out there, I meant that the lease might cover the island; the Government gave them a lease for the land. [308]

I had never heard, nor had anyone intimated that either the plaintiff or anyone else had any prior right for the ground upon which I located below the line of low tide. I did not consider that I was interfer-

(Testimony of J. P. Coyle.)

ing with the legal rights of anyone else. I considered my right was legal. It was state waters and I supposed that the State had jurisdiction on those waters and it was not covered by any license. Corking is a word amongst fishermen that means to lay or drift in front of another. You put your net in front of his. I put my net in front of Sand Island.

Recross-examination.

(Interrogated by Mr. FULTON.)

Q. Don't you know as a matter of fact that the State of Washington actually deeded by legislative enactment all of the bed of the Columbia River surrounding Sand Island to a depth of fifteen feet below low water to the United States? A. No.

Q. If it turns out that the State of Washington did so, and you put your buoys in eight or nine feet of water, you were putting them on the Government ground, weren't you?

To this question counsel for defendants then and there objected upon the ground that the same was calling for a conclusion of law.

A. No, I don't think so.

Q. But, as a matter of fact, if your buoys were only in fifteen feet, and not to exceed seven or eight feet of water, and the United States own to the depth of fifteen feet, you were on land belonging to the United States?

A. The inside buoy was in about six feet of water at low water.

Q. Well, the outside one was in about fifteen?

[309] A. I think so.

(Testimony of J. P. Coyle.)

Q. Then you were absolutely on Government ground? (No response.)

[Testimony of Erick Lindstrom, for Defendants.]

ERICK LINDSTROM, a witness called on behalf of the defendants, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

My name is Erick Lindstrom; age forty-four; residence McGowan, Pacific County, Washington. I have lived at McGowan with my family for five years, but I have lived in the State for about eighteen years. My business is fishing; I followed fishing in the old country and in this country. The first I did here was with drift net on the lower Columbia River in 1889. In 1891 or 1892 I was fishing with gill nets—I mean hooks. In 1896 I fished with set nets on the Columbia. We operated three until the time the freshets got high and we could only operate one. I operated this one about three weeks; it was about 350 feet long and was there during the high water. We used small mesh and caught big Chinook salmon. We caught about a ton and a half a day on the average; the entire season was 83 tons from these set nets and the record shows that in the cannery to-day. That was on the Columbia River in the year 1896. Set nets are constructed as follows: Where you have a shore right you fasten one end of the line to a tree or rock, and fasten that to the cork line on the net. You lay your net out and have anchors on the outside end. We use two anchors during the high water where the current is

(Testimony of Erick Lindstrom.)

strong, weighing from 150 to 200 pounds each. If I was not permitted to land on shore I would anchor the net where my right started, lay it out the same way, lay out the net and anchor the other end with a buoy and line fastened to the anchor so that I could haul it up any time when necessary. Where the current was [310] strong, that when we were running nets with an ordinary skiff, eighteen feet long, we had sometimes to let the nets go—it would pull our boats under. It would slack up a little at times, and when we could run the net successfully we had all kinds of fish. I am acquainted with Sand Island and know the territory on the south side of the island in front of what is called Sites Two and Three. In my experience I found it to be a real good place for set nets. You can fish there at almost any time, day or night. Part of the time the current was as strong there as at other places where I fished, but the biggest part of the time it is not. The only portion of the twenty-four hours in which the current is strong at Sand Island is about two hours. The first of the ebb and about the middle of the ebb tide it is pretty strong.

I am one of the defendants in this action, and am the same party who took out the three set net licenses referred to by Mr. McGowan in his evidence. I took out three licenses numbered 1433, 1434 and 1435. After I took out these licenses I made the anchors sufficient for holding the locations on the place. I put a chain through the rocks which would weigh about 300 pounds, put a chain around the rocks

(Testimony of Erick Lindstrom.)

about eight feet long and fixed it so it could be connected, and fastened the chain around the rocks, and attached 25 feet of wire cable to the chain with a wire clamp and used a cedar head, four feet long by eight inches square, and spiked the numbers to the buoys. These numbers were painted on boards six or seven inches wide and about twenty inches long, and painted with light lead color, and the numbers were painted on with black lamp black and oil, and the numbers were very plain—anybody could see them. The length of the figures were about seven inches. All that I did with these buoys was I planted them and left them. I planted them in front of Sites numbered Two and Three, my two locations in [311] front of Site Two and one in front of Site Three. On the Columbia River side of the stream at low tide the inside buoy was below low tide towards the Columbia River. These buoys were planted about 500 feet apart, I would judge. I haven't the exact measure. I planted them there on the 16th day of June, 1908. After they were planted there, we three together, the defendants McGowan, Coyle and myself, secured two men to look after the proposition.

Q. Did you take any steps to procure the gear, nets and other paraphernalia necessary to fish the locations?

A. All the steps were taken; they were brought into the office to be in position to order the gear. We figured out what gear it would take and put the order into the office, to order all our stuff.

(Testimony of Erick Lindstrom.)

Q. Did you fish the location? A. I did not.

Q. Why didn't you continue operations there?

A. They had papers served on us; we couldn't do it.

Q. What do you refer to by the papers served on you; was it the injunction in this suit?

A. We were stopped by the Columbia River Packers' Association from taking any further steps, fishing in the location, by the injunction in this suit. Since that time we made no further attempt to fish the ground.

(Witness continuing:)

I was intending to fish my three locations in 1908. I looked on Sand Island as one of the best fishing grounds on the river. I have been a fisherman since childhood, and that was one of the grounds where I could make money, but could not do it on account of being pushed off the earth.

If it had not been for the injunction that was served in this suit I would surely have fished these locations of mine, [312] and I would have continued to fish as long as I had the legal right to do so. According to the arrangements I had with McGowan I had the right to sell my fish and get the money, provided I sold the fish to McGowan at the regular market price.

I know the market price of salmon during the year 1908. It was five and a half and seven cents. The cannery salmon sells for less than the big salmon. For any fish up to thirty pounds the price was five

(Testimony of Erick Lindstrom.)

cents per pound, and above that seven cents. During the subsequent years the price was raising—the first two years was about a stand-off, and last year it was six and one-half and seven and one-half. This was the price paid on the grounds. We never had to pay for delivery. The launches pick them up and we get the same price as when delivered at the cannery.

Q. Can you tell what, in your opinion, was the reasonable quantity of salmon to catch at the locations where you located your set nets, per season, considering the eight nets as being operated as they were located?

To this question counsel for plaintiff then and there objected upon the ground that it was incompetent, irrelevant and immaterial and not the proper rule to the measure of defendants' damages.

A. I would not call myself a fisherman at all if I could not average fifty tons a year out of my location. (Witness continuing:)

I think that was a reasonable quantity to be produced from my three set nets. I used my own judgment in making my locations and the other defendants used theirs. I could not tell which was the best location. I presume probably they would average pretty near as good. [313]

Q. What would it have cost you to operate these eight nets per season, in your opinion?

To this question counsel for plaintiff then and there objected upon the ground that it was immaterial and irrelevant.

(Testimony of Erick Lindstrom.)

A. I am poor in figures, but the three of us figured it out together, and the total amount was \$3,000 for the season.

Cross-examination.

(Interrogated by Mr. FULTON.)

I live at McGowan and I have a wife and nine children. I am working on one job and another, working for P. J. McGowan and Sons. This is a corporation of which H. S. McGowan is general manager and president. They have a cannery at McGowan, but they have moved their cannery business down to Ilwaco. McGowan is now just a receiving station, warehouse and office. They get their salmon down to Ilwaco by their fishing launch. This launch runs in the water. We navigate the waters inside of Sand Island to Ilwaco. Fishing launches navigate these waters between Sand Island and the Washington shore on high tide whenever they have anything to ship. This cannery was moved from McGowan to Ilwaco about six years ago, I think—five or six years. It was moved down there by P. J. McGowan and Sons, and they have been operating a cannery at Ilwaco ever since. The only way they have of receiving fish is by boats navigating the waters of Bakers Bay north of Sand Island.

I have been working for P. J. McGowan and Sons since 1895 on a salary. I began working there in 1895, and have worked there ever since excepting one season. I couldn't remember just what year that was that I didn't work. I was working for P. J. McGowan and Sons in 1908 on a salary. [314]